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ALEXANDER L. STEVAS,
CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

THE STATE OF TEXAS

Petitioner,

V.

PLATORO LIMITED, INC.,

Respondent,

IN RE THE UNIDENTIFIED REMAINS OF A VESSEL, HER CARGO, APPAREL, TACKLE AND FURNITURE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION OF THE STATE OF TEXAS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case arises from the excavation by private parties of the archaeologically irreplaceable remains of the oldest New World shipwreck yet located, buried within the submerged lands belonging to the State of Texas, approximately one-half mile off the coast of Padre Island. The excavation was conducted without permission from the State of Texas, which subsequently recovered the artifacts. This case was brought by one of the private explorers, seeking to invoke the federal courts' admiralty jurisdiction to recover an award of salvage. The issues presented for review by this Court are:

(1) Whether the excavation of long-lost ancient vessels buried within the states' submerged lands involves a sufficient relationship with traditional maritime activity to justify application of

the federal courts' exclusive admiralty jurisdiction;

(2) Whether the existence vel non of marine peril, an essential element of a claim for salvage, must be determined as a factual matter with respect to an ancient vessel after its remains are located, or if marine peril exists as a matter of law with respect to such remains;

(3) Whether Texas' "constructive rejection" of salvage services, through statutes prohibiting unauthorized excavation of archaeological sites, was effective only "if the rejection must reasonably have been understood by the salvor;" and

(4) Whether the Eleventh Amendment bars this action, brought under a legislative consent-to-suit resolution, where no waiver of Eleventh Amendment immunity is stated, either by express language or

overwhelming implication, in the text of that resolution.

PARTIES TO THE PROCEEDING

The State of Texas is the Petitioner herein. Respondent is Platoro Limited, Inc., an Indiana corporation. Jefferson T. Burke and Billy Russell Algoe also intervened in this matter before the district court and filed notices of appeal to the Fifth Circuit Court of Appeals, but dismissed their appeals before filing briefs.

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PETITION OF THE STATE OF TEXAS
FOR WRIT OF CERTIORARI

The State of Texas, Petitioner herein, prays this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, in which said court permitted the recovery of an award of salvage by Respondent Platoro Limited, Inc., in connection with Platoro's unauthorized excavation of an archaeologically significant 16th Century Spanish vessel located approximately one-

half mile off the coast of Padre Island, within the submerged lands belonging to the State of Texas.

OPINIONS AND JUDGMENTS BELOW

The most recent decision of the Fifth Circuit Court of Appeals in this case, of which Petitioner seeks review, was rendered on January 20, 1983, and is reported at 695 F.2d 893 (Appendix A). The Fifth Circuit's order denying rehearing was rendered on February 17, 1983 (Appendix L), and has not been separately reported. The judgment of the Fifth Circuit was issued as mandate on February 28, 1983 (Appendix K). The Memorandum Opinion and Order of the United States District Court for the Western District of Texas which was under review in the Fifth Circuit was rendered on May 6, 1981, and is reported at 518 F. Supp. 816 (Appendix B). The district court also entered a Memorandum Opinion and Order

Denying New Trial and Entry of Additional Findings of Fact and Conclusions of Law on June 5, 1981 (Appendix D), and entered an Order denying the Intervenors' motion for new trial on June 8, 1981 (Appendix E), neither of which was officially reported.

Prior to its most recent decision in this case, the Fifth Circuit Court of Appeals had, on April 4, 1980, rendered an opinion reversing the decision of the United States District Court for the Western District of Texas that the case should be dismissed. That decision of the Fifth Circuit is reported at 614 F.2d 1051 (Appendix F). The decision of the district court there under review was issued on November 17, 1977 (Appendix G), and is not officially reported. This Court denied the petition for writ of certiorari to the Fifth Circuit Court of

Appeals on October 14, 1980. 449 U.S. 901.

The facts alleged, claim for recovery and parties to this suit are identical to two previous cases filed by Respondent Platoro Limited, Inc. The decision of the United States District Court for the Southern District of Texas in the first such case was rendered on December 26, 1973, and is reported at 371 F. Supp. 356 (Appendix J). On February 27, 1975, the Fifth Circuit Court of Appeals reversed that decision and ordered the case dismissed for lack of jurisdiction. 508 F.2d 1113 (Appendix I). The second case filed by Platoro was dismissed by the United States District Court for the Western District of Texas on August 13, 1976, in a Memorandum Opinion and Order (Appendix H), which is not officially reported.

A related suit was filed by the State of Texas against Platoro Limited, Inc., in the 28th Judicial District Court of Kenedy County, Texas, on December 13, 1967. The Court entered an unreported temporary restraining order and order appointing receiver of specific assets on that date (Appendix M). The case was subsequently dismissed by the State of Texas.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Petitioner, the State of Texas, seeks review of the opinion and final judgment of the United States Court of Appeals for the Fifth Circuit rendered on January 20, 1983 (Appendices A and K), by means of the issuance of a writ of certiorari to that court. The Fifth Circuit's order denying rehearing was rendered on February 17, 1983 (Appendix L), and this

petition is brought within the time allowed by 28 U.S.C. §2101(c) and Supreme Court Rule 20.4.

PROVISIONS OF LAW INVOLVED IN THIS CASE

The Submerged Lands Act of 1953, 43 U.S.C. §§1301-1315, provides in pertinent part:

> 43 U.S.C. §1301.
>
> (a) The term "lands beneath navigable waters" means--
>
> (1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;
>
> * * *
>
> (b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a

member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico.

43 U.S.C. §1311.

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof.

43 U.S.C. §1314.

> (a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

Article 147b of the Texas Penal Code, as effective in 1967, provided in pertinent part:

> TITLE: ARCHAEOLOGY.
>
> CHAPTER 1.
>
> REGULATING THE EXPLOATION FOR AND PROHIBITING THE FORGERY OF ARCHAEOLOGICAL OBJECTS.
>
> Sec. 3. If nonresidents of Texas, except agencies of the Federal Government, desire to make any exploration or excavation in or on any prehistoric

ruins or archaeological or vertibrate paleontological site in Texas, whether on private or State lands, a permit or annual license shall first be obtained from the Secretary of State. Such permit or annual license shall be issued by the Secretary of State upon: . . . (3) determination by said Secretary of State or by his duly designated representative of the satisfactory scientific fitness of the applicant to make archaeological or paleontological investigations, explorations, or excavations. Provided, however, that exploration to determine the presence of said archaeological and paleontological material exclusive of actual collecting or taking such material may be made previous to taking such permit. . . .

* * *

Sec. 6. Any person violating any of the provisions of this Act shall be guilty of a misdeameanor and shall forfeit to the State all articles and materials discovered by or misrepresented through his action or efforts. . . .

Sec. 7. The fact . . . that many archaeological and paleontological sites are being destroyed creates an emergency and an imperative public necessity. . . .

1939 Tex. Laws 60, 61.

Article 5421, Texas Revised Civil Statutes, as effective in 1967, provided in pertinent part:

> The Commissioner and the county attorneys of the State shall report to the Attorney General semi-annually, or oftener if they desire, the name and residence of each person, firm, association of persons or corporation who has cut, used, destroyed, sold or otherwise appropriated any timber from any public lands or taken any minerals or other property of value therefrom. . . . The Attorney General shall bring suit for the value of such property in any county where the injury or a part thereof occurs. . . .

1905 Tex. Laws 38.

House Concurrent Resolution No. 117, 65th Tex. Leg. (1977), provides in its entirety:

> WHEREAS, Platoro Limited, Incorporated, a foreign corporation authorized to transact business in the State of Texas, alleges that it recovered the remains of a vessel and its cargo, tackle, and furniture; and

WHEREAS, Platoro Limited, Incorporated, alleges that the State of Texas has taken possession of those remains without compensating Platoro Limited, Incorporated, for its expense in the salvage operation; now, therefore, be it

RESOLVED by the House of Representatives of the State of Texas, the Senate concurring, that Platoro Limited, Incorporated, is hereby granted permission to sue the State of Texas for whatever relief to which it may be entitled as a result of the State's taking possession of these remains; and, be it further

RESOLVED, that in the event suit is filed, service of citation and other required process be made on the Attorney General of the State of Texas, and that the suit be tried as other civil suits; and be it further

RESOLVED, that nothing in this resolution may be construed as an admission by the State of Texas, or by any of its employees, agents, departments, agencies, or political subdivisions of liability or of the truth of any allegation asserted by the claimant, but the alleged cause of action must be proved under the laws of this state as in other civil suits; and, be it further

> RESOLVED, that nothing in this resolution may be construed as a waiver of any defense, of law or fact, available to the State of Texas or to any of its employees, agents, departments, agencies, or political subdivisions, but every defense is specifically reserved.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

A. FACTS

On September 12, 1967, for the first time in over 400 years, the hands of man touched the remains of the Espiritu Santo. The Espiritu Santo last set sail on the morning of April 9, 1554, setting out as one of four Spanish vessels, "laden heavily with silver and colonists,

crew and cochineal, desires and dreams . . .."[1/] The ships set sail from Veracruz, returning to Spain by way of Havana. Before reaching Cuba, however, the ships were caught by an uncharacteristic and vicious spring storm in the Gulf of Mexico. Three of the four ships were driven back against the Texas coast, where they ran out of sailing room before the storm blew itself out. The three ships were driven aground, just off Padre Island, the narrow barrier reef extending from Corpus Christi to Port Isabel, where they were lost. The Espiritu Santo came to rest about a half mile off Padre Island, just north of the Mansfield Cut,

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1/ J. Davis, Treasure, People, Ships, and Dreams 7 (1977) (Exhibit R). (Unless otherwise indicated, all references to "exhibits" are to exhibits presented to the district court at the trial held on March 30, 1981, through April 1, 1981, before the United States District Court for the Western District of Texas.

where she settled to the clay bottom of the Gulf of Mexico, and was in due course covered by a four to ten foot layer of sand which, along with the encrustations which built up around the artifacts, effectively encased her remains from the surrounding environment and protected them from the corrosive effects of oxygen and the natural perils of the sea.

Survivors of the Espiritu Santo who made their way to shore apparently united with survivors of the other ships, and set out on a southerly trek along the coast, thinking themselves to be only two or three days from civilization. What followed was among the most gruesome and brutal tales of Texas history. Under the constant surveillance of hostile Indians who intermittently attacked, picking off members of the wandering band one at a time, the survivors struggled south against the inhospitable environment,

licking the morning dew from native vegetation for water, and ultimately shedding all clothing in a futile attempt to pacify the Indians. No more than two of the unfortunate Spaniards survived the tragic march south, which was to become an almost fabled part of Texas folklore, the first confused chronicling of which was compiled some 40 years after the events from stories told by Fray Marcos de Mena, one of the survivors.[2/]

Physical evidence of Fray Marcos' ordeal was virtually nonexistent until 1967, when the remains of the Espiritu Santo were located. The discovery was made by a group consisting of representatives of Platoro Limited, Inc., an Indiana corporation, and its joint venturers, William Kenon and Kurt Purvis.

2/ See J. Arnold and R. Weddle, The Nautical Archaeology of Padre Island - The Spanish Shipwrecks of 1554 35-48 (1978) (Exhibit P).

The express purpose of the joint venture was "finding a Spanish treasure ship off Padre Island." (Tr. 52).[3/] The wreck site discovered by the Platoro group was confined to an area approximately 80 by 100 feet (Tr. 118), at a water depth of 20 to 30 feet. (Tr. 70, 102, 121). As such, it was a very coherent archaeological site, apparently little affected by the waves or other conditions of the area. (Tr. 286, 298). It was covered by a four to ten foot layer of sand (Tr. 70, 191), and many of the artifacts were covered with a protective layer of encrustation (Tr. 589-92), which served to seal out corrosive oxygen.

The parties disagree sharply as to the adequacy of recovery techniques used by the Platoro group. A deflection shield

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3/ References to the transcript are to the transcript of proceedings at the trial on March 30, 1981, through April 1, 1981, unless otherwise indicated.

was fashioned by which the force generated by the propwash from the boat would expose, and sometimes scatter, the artifacts, which divers then attempted to recover. Upon learning of the excavations by the Platoro group, on December 13, 1967, the State of Texas filed suit, seeking and obtaining a temporary restraining order enjoining Platoro from "appropriating or taking any property of value from the public lands of the State of Texas," and from "engaging in . . . destroying or removing any artifacts or things of value from any historic ruin or archaeological site located on public lands of the State of Texas...."[4/] Prior to entry of the restraining order, however, Platoro had removed at least 1,600 articles from the site, including

4/ State of Texas v. Platoro Limited, Inc., No. 81 (28th Judicial Dist., Kenedy County, Texas) (Dec. 13, 1967) (Appendix M).

cannons and swivel guns, silver coins, crossbows, three virtually unique mariners' astrolabes and hundreds of ballast stones. Platoro transported these items to an ice cream factory in Indiana (Tr. 305, 309, 317-18), where the articles were stored until returned to the possession of the State of Texas in 1968 and 1969. The State placed the artifacts in the custody of the Texas Archaeological Research Laboratory at the University of Texas Balcones Research Center in Austin, where they were treated and preserved in accordance with the most advanced techniques known.

Although testimony offered by the State of Texas from leading archaeologists suggested that, in the view of those archaeologists, significant historical data had been lost because of the recovery techniques, inadequate records and methods of

preservation utilized by Platoro[5/] (Tr. 220-21, 266-69, 689-92), witnesses for both the State and Platoro described the remains of the Espiritu Santo as "perhaps the single most significant find" and "the most important archaeological find from Texas' Historical Period." (Tr. 238, 342).

B. PROCEEDINGS BELOW

This lawsuit was filed by Platoro on June 23, 1977. It is the third suit filed by Platoro in federal court, asserting an identical claim arising from a single set of operative facts.

Platoro first filed suit on August 6, 1969, in the United States District Court for the Southern District of Texas. Platoro Limited, Inc. v. The Unidentified

5/ Platoro contested the State's evidence on this point, offering evidence that the recovery techniques were, in the view of Platoro's witnesses, suitable.

Remains of a Vessel, etc., Civil Action No. 69-B-86 (hereinafter referred to as "Platoro I"). In that suit, Platoro sought to recover a salvage award for its activities in removing the then-unidentified remains of a sunken Sixteenth Century Spanish vessel buried within submerged lands belonging to the State of Texas. Exhaustive research conducted after the State of Texas recovered the artifacts from Platoro ultimately identified the remains as those of the Espiritu Santo. The State of Texas contested Platoro's claim, asserting its ownership of the artifacts recovered from its submerged lands, and disputing the propriety of any salvage award to Platoro. Jefferson T. Burke and Billy R. Algoe intervened in that case, also seeking salvage awards for their efforts in the recovery operations.

After trial before the United States District Court for the Southern District of Texas, the district court found that the State of Texas had adopted the common law rule that title to wrecked and abandoned vessels reverted to the sovereign after a year and a day, and therefore ruled that the State of Texas was the rightful owner of the remains of the vessel. Platoro I, 371 F. Supp. 356, 360 (S.D. Tex. 1973) (Appendix J). The court ruled, however, that Platoro and Intervenors Burke and Algoe should be awarded a recovery on their maritime salvage claims. Texas appealed the portion of that decision relating to the salvage award, and on February 27, 1975, the Fifth Circuit Court of Appeals reversed, holding that the district court lacked jurisdiction because the articles involved were entirely outside the Southern District of Texas at the time suit

was filed. Platoro Limited, Inc. v. Unidentified Remains of a Vessel, 508 F.2d 1113 (5th Cir. 1975) (Platoro I). (Appendix I). After remand, the case was dismissed for want of jurisdiction by the District Court on May 17, 1975.

On May 21, 1976, Platoro filed its second suit, in the United States District Court for the Western District of Texas. Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc., Civil Action No. A-76-CA-99 (hereinafter referred to as "Platoro II"). Pursuant to the State's motion, on August 13, 1977, the district court ordered that case dismissed for want of jurisdiction, ruling that the State of Texas was the real defendant at interest because it owned and had title to all the artifacts at issue, and therefore finding the suit to be barred by the Eleventh Amendment.

> Since the salvaged items in the instant case were not claimed by the owner within a year and a day of the wreck, title devolved on the sovereign, and thus, under the common law, the State of Texas now has title to all the recovered items. . . . Thus, since the State of Texas is the real defendant at interest in this suit, and since the State has not given its consent to be sued, this action cannot be maintained in the federal courts because the federal courts have no power, under the Eleventh Amendment, to hear it.

Platoro II, Memorandum Opinion and Order at 1-2 (August 13, 1976) (Appendix H). Platoro did not appeal that decision.

Some ten months later, on June 23, 1977, Platoro filed this suit), contending that it was authorized by House Concurrent Resolution No. 117 (65th Texas Legislature), which gave Platoro permission to sue the State for any relief to which it may prove itself entitled "under the laws of this state as in other civil

suits." (R. 7-10).[6/] On November 14, 1977, the Honorable Jack Roberts, United States District Judge for the Western District of Texas, entered a Memorandum Opinion and Order (Appendix G) finding that title to the artifacts rests with the State of Texas, and ruling that Platoro's salvage claim was barred by the two-year statute of limitations contained in 46 U.S.C. §730. Platoro appealed the dismissal of its salvage claim, but did not appeal the portion of the order dismissing its claim of title to the artifacts. On April 4, 1980, the Fifth Circuit Court of Appeals rendered its opinion stating that "the circumstances favor tolling the statute of limitations and granting Platoro the right to have its claim adjudicated," and ruling that

6/ HCR No. 117 is reprinted with the Provisions of Law Involved in this Case, supra.

Platoro's complaint stated a claim for salvage sufficient to overcome a Rule 12 motion to dismiss. Platoro Limited, Inc. v. Unidentified Remains of a Vessel, 614 F.2d 1051, 1055 (5th Cir. 1980) (Platoro III) (Appendix F). This Court denied certiorari on October 14, 1980. 449 U.S. 901. Accordingly, the case was remanded for a "determination of the merits" of Platoro's "salvage claim." 614 F.2d at 1056.

After remand, Messrs. Burke and Algoe were permitted to intervene in the case. A non-jury trial on the merits of all salvage claims was held on March 30, 1981, through April 1, 1981, before the United States District Court for the Western District of Texas, Honorable Lucius D. Bunton presiding. Testimony and evidence were introduced concerning

the nature of Platoro's operations, the artifacts found, expenses incurred, proper archaeological techniques, value of the artifacts, and differences among various shipwreck sites. On April 30, 1981, the Court entered its Memorandum Opinion and Order, which was filed on May 6, 1981 (Appendix B) and Judgment was entered (Appendix C) in favor of Platoro, but denying any relief to Intervenors Burke and Algoe on Eleventh Amendment and limitations grounds.

Texas appealed that judgment. Intervenors Burke and Algoe separately filed notices of appeal, but dismissed their appeals before filing briefs. On January 2, 1983, the Fifth Circuit Court of Appeals entered its opinion, ruling that H.C.R. No. 117 had waived the State of Texas' Eleventh Amendment immunity from

suit in federal court, that the federal courts' admiralty jurisdiction had been properly invoked, that the element of "marine peril," essential to allowing recovery on a maritime claim for salvage, existed "as a matter of law," and that Texas statutes prohibiting unauthorized excavations of archaeological sites and appropriation of property from state lands did not serve to reject Platoro's purported salvage services because "constructive rejection of salvage services should bar an award only if the rejection must reasonably have been understood by the salvor." Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, 695 F.2d 893, 901, 902 (5th Cir. 1983) (Platoro IV) (Appendix A). Texas now seeks a writ of certiorari to the Fifth

Circuit Court of Appeals to review these conclusions.[7]

REASONS FOR GRANTING THE WRIT

A. IMPORTANCE OF THE CASE

This case involves one of two much-litigated controversies[8] which

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7/ The Fifth Circuit also made rulings which had the effect of limiting Platoro's recovery to its one-third share of any amount recoverable as salvage services by the joint venture in which Platoro was a one-third participant, and eliminating the possible implication in the district court opinion that Platoro might additionally recover attorneys' fees.

8/ The other much-litigated controversy involved the recovery of the Nuestra Senora de Atocha off the Florida Keys by a private treasure hunting group known as Treasure Salvors, Inc. The dispute among Treasure Salvors, the State of Florida and the United States may be traced through the history of litigation as reflected in the decisions of the Fifth Circuit Court of Appeals. Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560 (5th Cir. 1981) (Treasure Salvors III); State of Florida, Department of State v. Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir. 1980) (Treasure Salvors II); Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569

together have largely created the presently available body of law governing the rights of coastal states to protect historic sunken vessels buried within the states' submerged lands from unauthorized treasure hunting. The current state of the law, as developed primarily by the Fifth Circuit Court of Appeals, poses a substantial and immediate threat of irreparable damage to the cultural heritage which Texas and other coastal states

8/ (Cont.) F.2d 330 (5th Cir. 1978) (Treasure Salvors I). Treasure Salvors II reached this Court on the question of whether the Eleventh Amendment immunized the remains of the vessel from federal court process under the facts of that case, and was the subject of this Court's decision in Florida Department of State v. Treasure Salvors, Inc., 102 S. Ct. 3304 (1982). In its Treasure Salvors decision, however, this Court did not reach the broader issues concerning the existence vel non of federal admiralty jurisdiction in cases involving historic sunken vessels buried within the submerged lands of coastal states wishing to preserve those archaeological landmarks in the public domain for proper excavation and study.

have sought to protect by forbidding unsupervised plundering of pre-twentieth century shipwrecks. The Texas Antiquities Committee has identified some 563 pre-twentieth century shipwrecks believed to be buried within the submerged lands of the State of Texas alone. Each of these wrecks constitutes a unique archaeological site, capable of revealing myriad secrets of people and their societies, belongings, hopes and dreams as they existed in a specific culture on a specific day when tragedy struck. As world-renowned underwater archaeologist Dr. George Bass testified at trial, "each wreck is like a miniature Pompeii, it is a time capsule." (Tr. 267).

Unless reversed, the decision of the Fifth Circuit in this case, following its own precedent in Treasure Salvors I, threatens to turn the timeless vaults buried beneath the sea into open tombs,

to be robbed and stripped of their contents one by one. Failure to correct the Fifth Circuit's expansive view of federal admiralty jurisdiction will substantially derogate of the public's right, as implemented by state statutes and policies, to assure the orderly recovery of archaeological landmarks, in favor of a judicially created and federally imposed doctrine[9/] favoring the rights of commercial treasure hunters to exploit those sites in search of gold and silver.

9/ As at least one district court has already noted in following the Fifth Circuit's precedents in this field, "[T]he dominant federal maritime law derives as much from the rules developed by the American admiralty courts as from Congressional acts." Cobb Coin Company, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 525 F.Supp. 186, 201 (S.D. Fla. 1981), appeal docketed, No. 81-5737 (11th Cir.). The same court ruled that the federal admiralty law of salvage superseded provisions of the Florida Archives and History Act which would restrict excavation of sites designated as state archaeological landmarks. Id. (preliminary injunction); 549 F.Supp. 540, 548 (1982).

B. FEDERAL ADMIRALTY JURISDICTION SHOULD NOT APPLY TO LONG-LOST VESSELS BURIED BENEATH THE SEA

The present aberration which permits application of federal maritime law to disputes involving the remains of long-lost vessels received its genesis at the appellate court level in 1978, when the Fifth Circuit ruled in Treasure Salvors I that federal admiralty law permitted the award of the remains of the Atocha, recovered from the continental shelf, outside the territorial waters of the United States, to Treasure Salvors. To reach this result, the court fashioned a "law of finds" which it characterized as the "American rule," rejecting the English common law rule that abandoned vessels reverted to the sovereign after a year

and a day.[10/] The court thus awarded title to the finder, suggesting alternatively that the maritime law of salvage would "not contemplate a different result." 569 F.2d at 337.

When it decided Platoro III in 1980, the Fifth Circuit concluded that its previous decision in Treasure Salvors I was "dispositive of the issue whether appellant properly invoked the court's admiralty jurisdiction." Platoro III, 614 F.2d at 1055. Although the fully developed record of the present case (Platoro IV) offers numerous factual distinctions, which were presented to the court below

10/ Prior to the Fifth Circuit decision, at least two state supreme courts had embraced the English common law rule, State ex rel. Bruton v. Flying "W" Enterprises, Inc., 160 S.E. 2d 482 (N.C. 1968); State ex rel. Ervin v. Massachusetts Company, 95 So.2d 902 (Fla. 1956), cert. denied, 355 U.S. 881 (1957), and the same rule had been adopted by the district courts in Platoro I and Platoro II.

as a basis for distinguishing or limiting its prior decisions in Treasure Salvors I and Platoro III,[11/] the Fifth Circuit's ruling in this case makes clear that the judicially created and federally imposed doctrines established in that court's decisions will deprive coastal states of the means to protect their historic resources.

The application of federal admiralty jurisdiction to preempt state law should be restricted to cases having "a significant relationship to traditional

11/ Factual distinctions relating to the issue of "marine peril" will be discussed more fully in Part C, infra. The point should not here pass, however, without at least noting that the remains of the Atocha were located on the continental shelf, outside the territorial waters of the United States. Treasure Salvors I, 569 F.2d at 337-38. By contrast, the remains of the Espiritu Santo were located a half mile off Padre Island, buried within lands belonging to the State of Texas. See Submerged Lands Act of 1953, 43 U.S.C. §§1301-1315; United States v. Louisiana, 363 U.S.1 (1960).

maritime activity." Foremost Insurance Company v. Richardson, 102 S.Ct. 2654, 2658 (1982); Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249, 268 (1972). The excavation of the remains of a long-lost vessel buried beneath the ocean floor simply lacks a sufficient nexus with "traditional maritime activity" to justify the severe disjointing of our system of federalism resulting from invoking the federal courts' preemptive admiralty jurisdiction.

Principles of salvage law are of ancient origin, and take no account of modern state interests in preservation and scientific investigation of sites with historical and archaeological significance. Salvage law developed to promote the "humanitarian principles. . . which encourage all to render aid in the face of marine peril." Legnos v. M/V

Olga Jacob, 498 F.2d 666, 671 (5th Cir. 1974).

> Useful services of any kind rendered to a vessel or her cargo, exposed to any impending danger and imminent peril of loss or damage, may entitle those who render such services to salvage reward.

The Blackwall, 77 U.S. (10 Wall.) 1, 11 (1870).

The law of salvage was never intended to be a license to loot. The mechanical application of a rule allowing "salvors" to excavate and recover anything they find for their personal benefit is entirely outside the historic purposes of salvage law. The noble and selfless principles sought to be promoted by the law of salvage are debased by the characterization of treasure hunting in the same terms.

The nonseaworthy remains of an ancient vessel have long ago lost any significant

relationship with ongoing maritime activity, and should, therefore, be no longer subject to the exclusive admiralty jurisdiction of the federal courts. Rather, as suggested in the amicus brief submitted to the Fifth Circuit on behalf of the Advisory Council on Underwater Archaeology, the Society for American Archaeology and the Society for Historical Archaeology, the law of ocean mining should be applied to artifacts buried beneath the submerged lands of the states. Under these principles, any person seeking to excavate an underwater buried historic site would be required to obtain authorization from the owner of the lands, just as any person seeking to drill for oil or gas must obtain permission. There is nothing in the law of salvage to compel or justify a rule treating underwater archaeological sites any differently than land-based archaeological sites. Had

Platoro's excavation been on state-owned lands a half mile inland, rather than a half-mile off shore, there could hardly be doubt of Texas' authority to prevent the looting and seize the artifacts removed. To permit a different result merely because the site was located a half-mile off Padre Island flies in the face of this Court's rejection of a mechanical "locality test" of admiralty jurisdiction in Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249.

C. "MARINE PERIL" SHOULD BE AN ISSUE OF FACT

Even if the federal courts' admiralty jurisdiction extends to the recovery of some ancient vessels, the law of salvage should apply only upon demonstration of an actual existing marine peril, either imminent or reasonably to be apprehended. At least since this Court's decision in

The Blackwall, 77 U.S. (10 Wall.) 1 (1870), the element of marine peril has been recognized as a sine qua non to a claim of salvage. The courts have historically rejected any claim for purported "salvage" services rendered to vessels "not in danger, either imminent or reasonably to be apprehended." LaRue v. United Fruit Company, 181 F.2d 895, 899 (4th Cir. 1950). See, e.g., United Boat Service Corp. v. Dailey, 232 F.2d 383, 384 (2nd Cir. 1956); Phelan v. Minges, 170 F. Supp. 826, 828 (D. Mass. 1959) ("A person rendering such unnecessary service is not a salvor but an opportunist or an officious intermeddler).

The existence vel non of "marine peril" is intrinsically a question of fact. Even the Fifth Circuit's decision in Treasure Salvors I seemingly gave tacit recognition to the factual nature of the issue, observing:

> There is no dispute that the Atocha was lost. Even after discovery of the vessel's location it is still in peril of being lost through the actions of the elements.

Treasure Salvors I, 569 F.2d at 337. After the Fifth Circuit's decision in Platoro III remanded this case for trial, a full factual record was developed concerning the susceptibility of the remains of the Espiritu Santo to loss through actions of the elements after the location of the remains was discovered. At the least the evidence presented by the State was sufficient to create a contested issue of fact, requiring resolution. The evidence showed that the Espiritu Santo had remained covered by a heavy layer of sand for over 400 years, unaffected by the elements and protected from even the most violent of hurricanes. Dr. John Herbich, Professor of Ocean and Civil Engineering and Head of the Ocean

Engineering Program at Texas A & M University, testified in detail about the oceanic conditions at the wreck site, specifically calculating such factors as fetch, average wave height, slope, sediment size, sediment transport and wave energy.

Dr. Herbich, whose testimony was refuted by no credible scientific or empirical evidence, unequivocally testified that, based upon his studies of maximum erosion and accretion at the site of the Espiritu Santo wreck, the remains of the vessel were subject to no peril of loss or scatter, either imminent or reasonably to be apprehended. Indeed, Dr. Herbich sharply contrasted the conditions off Padre Island with the conditions off the Florida Keys, where the Atocha was scattered, calculating the wave energy at the Espiritu Santo site to be 1,814 foot pounds per second, compared to wave

energy of 182,845 foot pounds per second at the Atocha site. (Tr. 761)

Despite the factual record in this case, the Fifth Circuit chose to characterize its previous decision in Treasure Salvors I as holding that "marine peril existed as a matter of law where the ship's location was unknown," 695 F.2d at 901, and further rejected any attempt to show the absence of peril after the location of the vessel was discovered. 695 F.2d at 901 n. 9.

At the least, marine peril should be determined as an issue of fact on a case-by-case basis. The practical salutary effect of such an approach might be to motivate would-be treasure hunters to consult reputable scientific authority and formulate a good-faith belief that some peril actually exists before excavating a site which might be better left

for later scientific exploration. In this case, reasonable inquiry of academically trained experts would likely have yielded the information that wrecks of this vintage buried beneath the sands have stabilized and reached a state of equilibrium such that their condition would not be materially affected by remaining there for another 50 years or more. (Tr. 225-6, 590). The stability of the sands in the shallow waters of the Gulf of Mexico off Padre Island might have been confirmed by the fact that bones of ice age animals found in the vicinity of the wreck have been there for 10,000 years. (Tr. 224)

The greatest peril to irreplaceable historic remains often arises not from the elements, but from the prospect of

improper excavation, exposure to the elements and loss of valuable scientific data. Such was the case here. As testified by Dr. George Bass, widely regarded as one of the world's leading underwater archaeologists, with respect to the remains of the Espiritu Santo as they lay on the clay bottom of the Gulf of Mexico, "simply being disturbed by human beings would constitute the greatest peril under the conditions that I have seen." (Tr. 301-2).

D. THE STATE'S "CONSTRUCTIVE REJECTION" OF SALVAGE SERVICES SHOULD HAVE BEEN HONORED

The State of Texas has, through laws which were in effect at the time of Platoro's activities, rejected any unauthorized excavations of archaeological sites or encroachment upon the State's submerged lands. Article 147b of the Texas Penal Code, as it existed in

1967,[12/] expressly required any non-resident of Texas, other than an out-of-state agency cooperating with a state-supported institution of higher education, to obtain a permit from the Secretary of State before making "any exploration or excavation in or on any. . . archaeological . . . site in Texas, whether on private or State land." Such permit could be issued by the Secretary of State only after his determination "of the satisfactory scientific fitness of the applicant to make archaeological or paleontological investigations, explorations, or excavations." Id.

12/ 1939 Tex. Laws 60 (reproduced in pertinent part among Provisions of Law Involved in this Case, supra). This statute was superseded when Texas enacted its current Antiquities Code in 1969. See Tex. Nat. Res. Code ch. 191.

The wreck of the Espiritu Santo indisputably constituted an "archaeological site" of great significance, as recognized by witnesses for both sides. (Tr. 238, 263, 342, 400). The statute clearly related to any exploration or excavation "in or on any. . . archaeological . . . site in Texas." Article 147b of the Texas Penal Code was enacted to prevent exactly the type of activity undertaken by Platoro. As stated in the emergency clause of the bill enacting article 147b, the fact "that many archaeological and paleontological sites are being destroyed creates an emergency and an imperative public necessity" for immediate legislative action. 1939 Tex. Laws at 61. Thus, at least since 1939, the State of Texas has manifested its clear intent to regulate the excavation of archaeological sites to assure the scientific qualifications of those who would disturb those

sites. Moreover, Texas' requirement of governmental approval for archaeological excavations within the State's submerged lands should hardly have come as a surprise to any would-be explorer. Dr. George Bass, who has conducted or participated in underwater archaeological digs in at least four continents, as well as in this country, testified that he had never undertaken an underwater excavation without obtaining the permission of the appropriate government, stating that such permission is uniformly required. (Tr. 277).

Texas' rejection of unauthorized encroachment upon its submerged lands, for "salvage" or other purposes, is further manifested by article 5421, Texas Revised Civil Statutes, as in effect in

1967.[13/] That statute required the Attorney General to bring suit against any person who had "appropriated . . . any minerals or other property of value" from any public lands. In fact, the Attorney General of Texas filed suit to enjoin Platoro's activities promptly after the State learned of their existence, and obtained a Temporary Restraining Order and Order Appointing Temporary Receiver, restraining Platoro from "appropriating or taking any property of value from the public lands of the State of Texas," and from "engaging in. . . destroying or removing any artifacts or things of value from any historic ruin or archaeological site located on public lands of the State of Texas and in particular the site of a sunken ship lying

13/ 1905 Tex. Laws 38 (reproduced in pertinent part among Provisions of Law Involved in this Case, supra.)

approximately 2.8 miles north of the Port Mansfield cut, and 1/2 mile east of the seaward shore off Padre Island. . . ." State of Texas v. Platoro Limited, Inc., No. 81 (28th Judicial District Court, Kenedy County, Texas, December 13, 1967) (Appendix M).

The Fifth Circuit decision in this case acknowledged the general rule that a salvage award "may be denied if the salvor forces its services on a vessel despite rejection of them by a person with authority over the vessel," 695 F.2d at 901, but nonetheless refused to apply the rule here because "Platoro had no reason to understand that its services had been rejected." 695 F.2d at 902. The court reasoned that Texas law at most constituted "constructive rejection" of unauthorized "salvage services," and that:

> At the very least, constructive rejection of salvage services should bar an award only if the rejection must reasonably have been understood by the salvor.

695 F.2d at 902.

If the federal courts are to exert their admiralty jurisdiction in such an expansive manner as to assume the role of arbiter of the fate of sunken historic artifacts, surely such an intrusion into the states' control of their submerged lands should be accomplished with maximum sensitivity to the states' legitimate interests in protecting their heritages from unauthorized looting.

The courts have historically recognized the right of a property owner to reject uninvited "services" of would-be-salvors, admonishing that salvage services "should not be thrust upon the unwilling." Consolidated Towing Co. v. Hannah, 509 F. Supp. 1031, 1035 (W.D. Mo. 1981), quoting

M. Norris, The Law of Salvage 195 (1958). See, e.g., Legnos v. M/V Olga Jacob, 498 F.2d 666, 672 (5th Cir. 1974); The Snow Maiden, 155 F. Supp. 518, 520 (D. Mass. 1957); The Choteau, 9 F. 211 (E.D. La. 1881). The State of Texas has never requested or accepted the assistance of Platoro in "salvaging" the Espiritu Santo. On the contrary, upon learning of Platoro's activities, State officials acted promptly to terminate them. Platoro acted at all times without the knowledge or permission of the State of Texas. There can be little doubt that had Platoro informed State officials of its intentions before undertaking recovery operations, those operations would never have been allowed. Texas has, through laws which were in effect and published in 1967, and which, of course, constitute public notice of the State's action, see Taff v. State, 155 S.W. 214,

216 (Tex. Crim. App. 1913), clearly rejected any unauthorized excavation of archaeological sites or encroachment upon its submerged lands. Significantly, the only state court to interpret the pertinent Texas statutes with respect to this controversy found them applicable to Platoro's activities and enjoined Platoro from further excavation on the Espiritu Santo, and further ordered Platoro to relinquish all remains of the vessel. (See Appendix M). The State has rejected Platoro's "salvage" services, and Platoro is precluded from now recovering compensation for those "services," which in fact amounted to no more than a naked attempt to enter upon State lands and appropriate State property.[14/]

14/ As stated by one of Platoro's joint venturers when asked what service he and his colleagues had rendered for the State of Texas, the Treasure hunters who excavated the Espiritu Santo were "not trying to render anything to the State of

E. TEXAS HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY

The Fifth Circuit correctly recognized that Platoro's claim is barred by the Eleventh Amendment prohibition of suits against the State[15/] unless Texas has waived its immunity.

> Platoro does not argue that the eleventh amendment does not apply to this suit; indeed, given Platoro's failure to appeal the district court decision [in Platoro II] that Texas owned the res and that suit was therefore barred by the eleventh amendment, it is now res judicata that the eleventh amendment applies.

14/ (Cont.) Texas. . .," (Tr. 201), and in fact removed all the artifacts they recovered to the State of Indiana until ordered to return them by the district court for Kenedy County. (Tr. 49).

15/ Platoro Limited, Inc. is an Indiana corporation. Thus the Eleventh Amendment literally applies, even under the view long held by Mr. Justice Brennan. See, e.g., Florida Department of State v. Treasure Salvors, Inc, 102 S.Ct. 3304, 3322 (Brennan, J., concurring in part and disserting in part).

695 F.2d at 898. The court further recognized the settled authority from this Court that a waiver of Eleventh Amendment immunity will be found "'only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."'" 695 F.2d at 899, quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974), quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).

The Fifth Circuit nonetheless chose to modify the rule repeatedly stated by this Court requiring any waiver of Eleventh Amendment immunity to appear "from the text," reasoning that the cases applying that rule all involved waivers "in statutes of general application," whereas this case involved a legislative resolution permitting a single party to sue.

> No Supreme Court case has involved a state waiver which was enacted to permit one particular suit alone. . . .

695 F.2d at 899. The Fifth Circuit then fashioned a new standard for reviewing consent-to-sue resolutions, looking to "the circumstances as well as the text." 695 F.2d at 900.

A state clearly has the prerogative to consent to suit in its own courts without waiving its Eleventh Amendment immunity from suit in federal court. Smith v. Reeves, 178 U.S. 436 (1900). It has heretofore been generally accepted by all state legislatures, including Texas', that mere legislative consent for a state agency to "be sued" is insufficient to waive Eleventh Amendment immunity from suit in federal court. Ford Motor Company v. Department of Treasury of State of Indiana, 323 U.S. 459 (1945); Great Northern Life Insurance Co. v.

Read, 322 U.S. 47 (1944); McDonald v. Illinois, 557 F.2d 596 (7th Cir. 1977), cert. denied, 434 U.S. 966; Martin v. University of Louisville, 541 F.2d 1171 (6th Cir. 1976); Jagnandan v. Giles, 538 F.2d 1166, 1177 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977).

House Concurrent Resolution No. 117,[16/] the legislative consent to suit resolution involved here, expressly directs that Platoro's suit must "be tried as other civil suits," and that

> . . . the alleged cause of action must be proved under the laws of this state as in other civil suits. . . .

(Emphasis added). This language strongly suggests a legislative contemplation of suit in the state courts only. The

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16/ H.C.R. No. 117, 65th Tex. Leg. (1977) (reproduced among Provisions of Law Involved in this Case, supra).

consent was predicated upon the Legislature's assumption that Platoro's claim would be governed by procedural and substantive rules adopted by the Legislature and courts of Texas. The procedures and remedies available in an in rem admiralty action are foreign to the jurisprudence of Texas and, insofar as applicable to the State, would be violative of well-settled public policy. The language of House Concurrent Resolution No. 117 does not justify imputation of a legislative intent to subject the State to the jurisdiction of a forum operating under procedures beyond the control of the State and with power to impose remedies contrary to the public policy of Texas.

On the contrary, Platoro was granted permission to sue the State upon its allegation that the State had taken possession of those remains without "compensating" Platoro "for its expense" in the

recovery operation, and Platoro was authorized to seek relief to which it may be entitled "as a result of the State's taking possession of these remains." Service of citation and other process was required to be made on the Attorney General. House Concurrent Resolution No. 117 at 1. Cf. Admiralty Rule C, providing for execution of process by arresting the vessel in an admiralty action in rem. Clearly, what was contemplated by the Legislature was a conventional civil action for damages rather than an in rem admiralty action in which the State's property could actually be attached, arrested, and ultimately subjected to a public sale. Indeed, Platoro has availed itself of the consent actually granted by H.C.R. No. 117, and has filed a pending suit in state district court alleging claims arising under state law. Platoro Limited v. State of Texas, No. 279,747

(200th Judicial District Court, Travis County, Texas.)

This Court's decision in Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944), that a State's consent to suit "in the court having jurisdiction," 322 U.S. at 49 n.1, was insufficient to waive Eleventh Amendment immunity, should be controlling here. House Concurrent Resolution No. 117 does not manifest a "clear declaration" of intent to subject the State to the jurisdiction of a federal admiralty court. In the absence of such a clear declaration, the federal courts lack jurisdiction to hear Platoro's claim.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Upon review, the decision below should be

vacated and this case should be dismissed for want of jurisdiction because the case does not present a claim properly cognizable under the admiralty jurisdiction of the federal courts, and because the action is barred by the Eleventh Amendment. Alternatively, if the Court addresses the merits of Respondent's "salvage" claim, the case should be reversed because of Texas' rejection of any such salvage services and because of the absence of any legitimate "marine peril" or, alternatively, should be remanded for a factual determination of the existence vel non of any marine peril after the discovery of the location of the remains of the Espiritu Santo.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 17th day of May, 1983, three copies of the foregoing Petition for Certiorari and the accompanying Appendix were served upon counsel for Respondent by placing same in the United States mail, postage prepaid, addressed to Mr. Jack Sanchez, O'Leary, Sanchez & Benton, P.O. Box 4215, Brownsville, Texas 78520. I further certify that all parties required to be served have been served.

_____

James F. Parker

APPENDIX IS PRESENTED

IN A SEPARATE VOLUME

Office-Supreme Court, U.S.
FILED
MAY 17 1983
ALEXANDER L. STEVAS,
CLERK

82-1871

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

THE STATE OF TEXAS

Petitioner,

V.

PLATORO LIMITED, INC.,

Respondent,

IN RE THE UNIDENTIFIED REMAINS OF A VESSEL, HER CARGO, APPAREL, TACKLE AND FURNITURE

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION OF THE STATE OF TEXAS FOR WRIT OF CERTIORARI

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APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

Rendered January 20, 1983

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.

No. 81-1257

695 F.2d 893 (1983)

PLATORO LIMITED, INC.,
Plaintiff-Appellee,

Jefferson T. Burke and Billy Russell Algoe, *Intervenors-Appellees,*

v.

The UNIDENTIFIED REMAINS OF A VESSEL, HER CARGO, APPAREL, TACKLE, AND FURNITURE, IN A CAUSE OF SALVAGE, CIVIL AND MARITIME, *Defendant,*

State of Texas, *Claimant-Appellant.*
No. 81-1257.

United States Court of Appeals,
Fifth Circuit.

Jan. 20, 1983.

Appeals from the United States District Court for the Western District of Texas.

Before BROWN, WISDOM and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

This case arises out of a dispute between the State of Texas and Platoro, Ltd., a corporation organized to find and recover treasure from ancient shipwrecks, over the results of a successful operation by Platoro. The two parties have been in litigation over this operation since the late 1960's, and this appeal marks their third appearance in this court. We are unfortunately unable to put an end to the controversy here: while we affirm in part the district court's judgment for Platoro, we must remand the case for recalculation of the proper award.

I. FACTUAL AND PROCEDURAL BACKGROUND.

This case has a long and complex history. In 1555, the Spanish galleon *Espiritu Santo* sank in a storm. The ship was lost beneath the sea for over four centuries, until the plaintiff, Platoro, located it in 1967. Platoro recovered various items from the wreck and removed them to Indiana, Platoro's home state.

The State of Texas applied to a state court for and received a temporary restraining order preventing Platoro from continuing its recovery activities. Negotiations ensued, and Platoro believed that an agreement was reached to divide the recovered items equally between it and Texas. In this belief, Platoro sent the items to Texas, and the State took steps to clean and preserve them.

It became clear, however, that Texas did not believe it was bound by the agreement. Platoro then brough an *in rem* suit in federal court against the vessel, claiming the compensation due a salvor. The suit was in the Southern District of Texas, which included the site of the wreck. The district court ruled that Platoro was entitled to a salvage award. *Platoro, Ltd. v. Unidentified Remains of a Vessel*, 371 F.Supp. 351 (S.D.Tex.1970). The Fifth Circuit reversed and remanded the case with instructions to dismiss it, because the items had not been in the Southern District of Texas since their recovery: when Platoro returned them to Texas, the State kept them in Austin, in the Western District. *Platoro, Ltd. v. Unidentified Remains of a Vessel*, 508 F.2d 1113 (5th Cir.1975) (Platoro I). The Fifth Circuit also pointed out that, since Texas was asserting ownership rights in the items, there were potential eleventh amendment problems. *Id.* at 1115 n. 3. Platoro sought an eleventh amendment waiver from the Texas legislature, but did not receive one. In 1976, Platoro sued again, this time in the Western District of Texas. The

district court ruled in an unpublished opinion that Texasa owned the items and Platoro's salvage claim was therefore barred by the eleventh amendment.

Platoro did not appeal; instead, it returned to the Texas legislature, from which it received a resolution of waiver.[1] Platoro then filed this suit, only to have the district court dismiss it on the ground that the statute of limitations had run. Platoro appealed to this court, which held that the running of the statute was tolled and remanded the case for trial. *Platoro, Ltd. v. Unidentified Remains of a Vessel*,614 F.2d 1051 (5th Cir.1980) (Platoro II).

On remand, the district court, 518 F.Supp. 816, held that Platoro's salvage services should be recompensed, and that their value was at least equal to that of the res. The district court therefore ordered that Texas either surrender the artifacts to Platoro or auction them and give Platoro all auction proceeds. The court also awarded attorneys' fees to Platoro.[2]

What is before this court now is Texas' appeal from that judgment. Texas raises several arguments but they fall into four basic categories. The first is that the legislature's resolution of waiver only authorized suit in state court, and thus the eleventh amendment still bars this action. The second category consists of allegations that the proper predicate for making a salvage award

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1. The precise scope of the waiver is a subject of controversy here. *See* part II, infra.

2. There were two intervenors below, Jefferson T. Burke and Billy Russell Algoe. They were members of Platoro's crew who asserted individual salvage claims. The district court found that they had proved their claims, but no relieve could be granted them because Texas' eleventh amendment waiver did not extend to them. They filed a notice of appeal, but the appeal was later dismissed on their own motion.

did not exist. Third, Texas contests the nature and amount of the salvage award. Finally, it has various objections to the award of attorneys' fees and prejudgment interest.[3] We will discuss each of Texas' claims in turn.

II. ELEVENTH AMENDMENT WAIVER

The eleventh amendment prohibits suits in federal court against a state unless the state has consented to the suit. *E.g., Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Association,* 450 U.S. 147, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981); *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945). Platoro does not argue that the eleventh amendment does not apply to this suit; indeed, given Platoro's failure to appeal the district court decision that Texas owned the *res* and that suit was therefore barred by the eleventh amendement issue here is raised by Texas: whether the Texas Legislature's resolution waived immunity to suit in federal court or restricted Platoro to an action in state court. It is clear that Texas could put such a restriction on the waiver, *Ford Motor Co., supra; Great Northern Life Insurance Co. v. Read,* 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944); *Smith v. Reeves,* 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140 (1900); the question here is whether it did. We hold that it did not.[4]

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3. The court below did not explicitly grant prejudgment interest, but Texas apparently read the opinion as doing so. See part V.B., *infra,* for a full discussion of the issue.

4. It could be argued, although neither party has raised the question, that the eleventh amendment issue was decided by the *Platoro II* and is thus the law of the case. The doctrine of the law of the case is not restricted to express rulings of the earlier court. *Morrow v. Dillard,* 580 F.2d 1284 (5th Cir.1978); *Carpa, Inc. v. Ward Foods,*

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The resolution passed by the Texas Legislature reads:

> WHEREAS, Platoro Limited, Incorporated, a foreign corporation authorized to transact business in the State of Texas, alleges that it recovered the remains of a vessel and its cargo, tackle. and furniture; and
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> WHEREAS, Platoro Limited, Incorporated, alleges that the State of Texas has taken possession of those remains without compensating Platoro Limited, Incorporated, for its expense in the salvage operation; now, therefore, be it
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> RESOLVED by the House of Representatives of the State of Texas, the Senate concurring, That Platoro Limited, Incorporated, is hereby granted permission to sue the State of Texas for whatever relief to which it may be entitled as a result of the state's taking possession of these remains; and, be it further
>
> RESOLVED, That in the event suit is filed, service of citation and other required process be made on the Attorney General of the State of Texas, and that the suit be tried as other civil suits; and, be it further
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> RESOLVED, That nothing in this resolution may be construed as an admission by the State

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Inc., 567 F.2d 1316 (5th Cir.1978); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), *cert. dismissed*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974). Nevertheless, we decline to rely on the law of the case here, since the eleventh amendment issue was not contested before the *Platoro II* court and it is now of central importance to the case. Our decision is made easier by the fact that we reach the same result on the merits as we would were we to apply the law of the case: Texas has waived its eleventh amendment immunity.

> of Texas, or by any of its employees, agents, departments, agencies, or political subdivisions of liability or of the truth of any allegation asserted by the claimant, but the alleged cause of action must be proved under the laws of this state as in other civil suits; and, be it further
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> RESOLVED, That nothing in this resolution may be construed as a waiver of any defense, of law or fact, available to the State of Texas or to any of its employees, agents, departments, agencies, or political subdivisions, but every defense is specifically reversed.

(emphasis added). Texas argues that the italicized portions indicate that the legislature intended to limit Platoro to Texas courts. The State implies this result because: (1) admiralty actions are technically not civil suits; (2) in an *in rem* action, arrest of the *res* takes the place of service of process; and (3) an admiralty court would apply federal admiralty law, not "the laws of this state."[5]

The Supreme Court has addressed eleventh amendment issues many times. A number of its cases dealt only with whether the suit was one against the state, and

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5. We note that none of Texas' textual implications would preclude a federal diversity suit. Platoro is an Indiana corporation and more than $10,000 is at stake, so that a diversity action would be at least theoretically possible, and in such a suit (which would be a civil action) service would be on the Texas Attorney General and the law of Texas would almost certainly apply. We are uncertain what Platoro could allege as a cause of action, however, since the salvage action is only available in admiralty. The only possibility would seem to be a *quantum meruit* claim.

Nevertheless, the point is that, even treating Texas' arguments as conclusive, they do not limit Platoro to state courts. We need not decide whether Texas may permit a diversity action while forbidding an admiralty one, however, since we find that the waiver also applies to admiralty cases.

therefore concerned merely whether the eleventh amendment applied, not whether it was waived. Many of the waiver cases involve the interpretation of Congressional action to determine either whether it directly abrogated eleventh amendment immunity or whether it conditioned state participation in a program or business on waiver of the eleventh amendment. Insofar as the question in those cases was the intent and power of Congress, they are not controlling here.

There are, however a number of cases dealing with alleged state waivers of the eleventh amendment. In *Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Association,* 450 U.S. 147, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981), the Court reaffirmed its holding in *Edelman v. Jordan,* 415 U.S. at 673, 94 S.Ct. at 1360-61, that "[i]n deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" (quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171, 29 S.Ct. 458, 464, 53 L.Ed. 742 (1909)). Both of these cases dealt with state participation in federal programs as an alleged waiver, but the Court's language and citation (in *Edelman,* 415 U.S. at 673, 94 S.Ct. at 1360) of *Great Northern Life Insurance Co. v. Read,* 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944), a case dealing with a state statute alleged to waive the eleventh amendment, indicate that use of the standard is not restricted to the evaluation of congressional action.

Nonetheless, the Supreme Court has never confronted a situation precisely like this. No Supreme Court case has involved a state waiver which was enacted to permit one particular suit alone; in the cases from the Supreme Court and this circuit, the alleged waivers were in statutes of general application, usually state tort claims

acts or statutes providing for suits for refund of excess state taxes. *See, e.g., Kennecott Copper Corp. v. State Tax Commission,* 327 U.S. 573, 66 S.Ct. 745, 90 L.Ed. 862 (1946) (tax refund statute); *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945) (same); *Great Northern Life Insurance Co. v. Read,* 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944) (same); *Chandler v. Dix,* 194 U.S. 590, 24 S.Ct. 766, 48 L.Ed. 1129 (1904) (statute authorizing suits to contest validity of sales of land for back taxes); *Smith v. Reeves,* 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140 (1900) (tax refund statute); *Jagnandan v. Giles,* 538 F.2d 1166 (5th Cir. 1976), *cert. denied,* 432 U.S. 910, 97 S.Ct. 2959, 53 L.Ed.2d 1083 (1977) (law creating state university Board of Trustees with capacity to "sue and be sued"); *Kiesel v. Florida Department of Natural Resources,* 479 F.2d 1261 (5th Cir. 1973) (tort claims act); *Mifsud v. Palisades Geophysical Institute, Inc.,* 484 F.Supp. 159 (S.D.Tex.1980) (tort claims act).

We note that, even under the rationale of these cases, Texas' argument is weak.[6] The portions of the resolution the State relies on are not designed to specify the substantive law applicable. The provision requiring Platoro to prove its case "under the laws of this state as in other civil suits," when read as a whole, is simply intended to emphasize that Texas is not admitting liability, but merely permitting suit; the point is that the burden of proof still rests on Platoro as in an ordinary suit. We are not persuaded that the legislature meant to invoke the technical distinction between admiralty actions and civil suits. Finally, we do not read the provision for service of process on the Attorney General of Texas as mandatory, thus impliedly excluding an *in rem* proceeding: it merely directed that any "service of cita-

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6. Our analysis of the resolution includes no reference to its legislative history because our research has not located any.

tion and other *required* process" (emphasis added) be made on the Attorney General, so that Platoro would know whom to serve if personal service were required. In *Kiesel v. Florida Department of Natural Resources, supra,* an admiralty case, we held that the Florida tort claims act, which made the state subject to suit "in the same manner as a private individual" and thus was not on its face limited to state court, did not become so limited by a further provision that venue of such suits would lie in the county where the cause of action arose. 479 F.2d at 1262. We believe that the alleged restrictions in the Texas resolution similarly do not alter its character as a general waiver.

Further, it is reasonable in a case like this, where the waiver is directed only to a single suit and has no clearly expressed limitations, to look beyond the text of the waiver to the circumstances of its enactment. The case for so doing is even stronger where, as here, there had already been litigation on the subject between the parties. *Edelman* speaks only of looking to the text and the implications to be drawn from it, but *Edelman* and the other Supreme Court cases deal with statutes of general application. It is less likely to be a state's intent to permit a large class of suits to be brought against it in federal court than to permit a single one, and a waiver for a single suit will clearly be enacted only upon an evaluation by the legislature of the circumstances of that particular suit. We still require that the waiver meet the *Edelman* test of such "overwhelming implications ... as [will] leave no room for any other reasonable construction," 415 U.S. at 673, 94 S.Ct. at 1361; we merely permit the implications to be drawn from the circumstances as well as the text.

In this case, the circumstances indicate that Texas must have intended to permit suit in federal court. There had already been two suits in federal court before the resolution was passed. Both had been suits in admiralty claiming salvage, an area of exclusive federal

jurisdiction. M. Norris, *The Law of Salvage* § 14 (1958 & Supp. 1974). Indeed, in the first suit, the Southern District of Texas actually enjoined the state court which apparently then had custody of the artifacts from taking any action with respect to them. *Platoro, Ltd. v. Unidentified Remains of a Vessel*, 371 F.Supp. 351, 355 (S.D.Tex.1970). This court held in *Platoro I* that the Southern District had had no jurisdiction, 508 F.2d at 1116, but we did not comment on the propriety of the injunction. The State must then have known that it was possible that a federal court might hold a state-court suit barred.[7] In *Platoro I*, this court noted the potential eleventh amendment problems. 508 F.2d at 1115 n. 3. Platoro then sought a waiver resolution, which the legislature refused. Platoro filed another suit in federal court; the district court dismissed it on eleventh amendment grounds; and *then* the legislature passed the resolution in question.

Given the facts that the litigation had been entirely in federal court,[8] that at least one district court was willing (properly or improperly) to enjoin state court action, that Platoro's claim had always been in admiralty, and that the legislature changed its mind about the waiver only after there had been a dismissal on eleventh

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7. We express no opinion on the correctness of the issuance of the injunction. We simply point out that, since there had been an injunction which was not overturned on the merits, the Texas legislature must have realized that suit in state court might be held impermissible. This strengthens the inference that the legislature intended to permit a federal suit, since the legislature might well have thought that a limitation to state court would make the waiver meaningless.

8. Texas alleges in its reply brief that Platoro has used the waiver of sovereign immunity to file suit in state court. This has no bearing on the situation at the time the legislature passed the resolution; the only state court action at that point had been the suit enjoined by the district court before *Platoro I*.

amendment grounds, we believe that the only reasonable construction of the resolution is as a waiver of Texas' eleventh amendment immunity. This suit may therefore be maintained in federal court.

III. PREREQUISITIES OF SALVAGE CLAIM.

Texas argues that, even if it has waived its eleventh amendment immunity, Platoro, is still not entitled to a salvage award. The first ground is that Platoro failed to establish "marine peril," one of the elements of a salvage claim; the second is that Texas rejected the salvage services, and that therefore it was improper to make an award.

A. Marine Peril.

This court addressed the marine peril element of a salvage claim under strikingly similar circumstances in *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir.1978), aff'd in part and rev'd in part sub nom. Florida Department of State v. Treasure Salvors, Inc.*, _____U.S._____, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982) (the Supreme Court did not discuss the salvage issue). In *Treasure Salvors*, another Spanish galleon had sunk off the Florida coast and remained undisturbed for over three hundred years. The United States argued on appeal that the district court had erroneously made a salvage award in the absence of marine peril. This court held first, that the district court had applied the law of finds, not that of salvage; and second, that the result could alternatively be upheld as a salvage award, because marine peril existed as a matter of law where the ship's location was unknown.[9] *Treasure Salvors*, 569 F.2d at 336-37. We

9. Texas argues that the Fifth Circuit in *Treasure Salvors* required that the vessel still be in peril after its location was discovered, but we believe that is a misreading of the opinion. In any event the *Espiritu Santo* was still in peril after its position was

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find no basis for distinguishing *Treasure Salvors* from the case now before us, and therfore find that there was marine peril.

B. REJECTION OF SALVAGE SERVICES.

A salvage award may be denied if the salvor forces its services on a vessel despite rejection of them by a person with authority over the vessel. *The Indian*, 159 F. 20, 25 (5th Cir.1908); *Norris, supra*, §§ 114-16; see *Legnos v. M/V Olga Jacob*, 498 F.2d 666, 672 (5th Cir.1974); *Fort Myers Shell & Dredging Co. v. The Barge NBC 512*, 404 F.2d 137, 139 (5th Cir.1968). In this case, Texas argues that it rejected the salvage services by having two laws that were then on its books: Tex.Penal Code art. 147b(3) (Vernon 1952) (repealed 1969), which required nonresidents to get a permit from the state before engaging in "any exploration or excavation in or on any ... archaeological ... site in Texas ..."; and Tex.Rev.Civ.Stat.Ann. art. 5421 (Vernon 1962) (repealed 1977), which authorized the Attorney General to sue anyone who had "appropriated ... any minerals or other value ..." from state lands.[10]

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discovered. Texas' only argument to the contrary is that the vessel was effectively sealed under a thick layer of sand and thereby protected; we observe first, that this is information which would be available only in hindsight and thus should not be considered in evaluating Platoro's actions, and second, that it is far from clear that the sand would remain sufficient protection from the various perils of the Gulf of Mexico.

The *Platoro II* court also decided the issue of marine peril in Platoro's favor. We will not use the doctrine of the law of the case here, though, because the issue was raised in *Platoro II* by a motion to dismiss for failure to state a salvage claim. The *Platoro II* court did not specify the standards by which it decided the question, so we do not rely on its determination.

10. Texas does not argue that its state court suit under article 5421 to enjoin Platoro's excavation constituted a rejection. Indeed, it could not, since the services at issue were rendered before the injunction was issued.

We note at the outset that we can find no case where a salvage award was denied because of a constructive rejection of salvage services. The cases involve direct and unequivocal rejection, usually by the master of the distressed ship. *See, e.g., The Indian, supra;* Norris, supra, §§ 114-16. At the very least, constructive rejection of salvage services should bar an award only if the rejection must reasonably have been understood by the salvor.

Platoro had no reason to understand that its services had been rejected. In the first place, it was far from clear in 1967 that Texas owned the vessel; that was not established until Platoro failed to appeal the 1976 district court decision awarding the *res* to Texas. Further, even if Platoro should have known that Texas was the owner, which we do not believe it should have, the statutes were not calculated to put Platoro on notice that its services had been rejected. There was nothing in the penal statute to indicate to Platoro that a sunken Spanish galleon was an "archaeological site" within the meaning of the statute.[11] Texas had apparently made no attempt to designate such sites, or indeed even to define them.

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11. It is interesting to note that the Texas Antiquities Code, Tex.Nat.Res.Code Ann. §§ 191.-001-.174 (Vernon 1978 & Supp.1982), which was enacted in 1969 and thus does not apply to this case, makes extensive and pointed reference to sunken ships. *See* § 191.002 (Texas public policy to preserve and protect "pre-twentieth century shipwrecks" and "sunken or abandoned ships and wrecks of the sea" and their contents); §§ 191.053-.056 (providing for contracts, permits, and compensation for salvage services and supervision thereof by the state); § 191.091 (entitled "Ships, Wrecks of the Sea, and Treasure Imbedded in Earth" and designating "[s]unken or abandoned pre-twentieth century ships and wrecks of the sea" and their contents state archaeological landmarks); and §§ 191.093, 191.095 (limiting conditions under which landmarks may be "salvaged"). The contrast to the statutes in force in 1967 could scarcely be greater.

Similarly, the civil statute in question did not provide adequate notice. It was under the heading "Suits for Minerals and Timber." Further, it did not reject salvage services, for salvage awards are available only when the salvaged property is returned to the owner, not when it is "appropriated." See Norris, *supra*, §§ 102-03.

We therefore find that there was marine peril and that neither of the statutes that Texas relies upon effectively rejected Platoro's salvage services. Texas raised no other objections that would totally bar any salvage award;[12] we thus move on to consideration of the amount awarded.

IV. THE SALVAGE AWARD.

The district court, after evaluating the traditional elements by which the amount of a salvage award is determined,[13] held that Platoro was entitled to an award at least equal to the value of the *res*. The court therefore ordered Texas to surrender the *res* to Platoro or have it sold by the court, with the entire proceeds, less court costs and costs of sale, to go to Platoro.

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12. In a footnote, Texas argues that Plator's attempt to appropriate the *res* should bar a salvage award. While embezzlement of the *res* can forfeit an award, the proof must be beyond a reasonable doubt. Norris,*supra*, § 101. We cannot make such a finding here. Platoro took the property to Indiana under a good-faith belief of ownership. Belief that they own the vessel, however, may be insufficient to protect embezzling salvors. *See Danner v. United States*, 99 F.Supp. 880 (S.D.N.Y.1951); *Norris, supra*, § 106. Nevertheless, the facts here do not justify a finding of embezzlement. The issue of ownership was genuinely in doubt, there was no destruction of the *res*, and Platoro voluntarily returned the *res* to Texas. The salvage suit is thus not barred.

13. *See* note 16, *infra*, for the factors to be considered in making a salvage award.

Texas objects to this award for several reasons. First, it claims that the district court, in making the award, ignored the fact that there were co-salvors who were not before the court and whose shares should rightfully have gone to the owner, not to the suing co-salvor. Second, Texas protests the award of the *res* itself, and requests that the award be expressed as a number of dollars. Third, the State argues that the award should be diminished to take into account the sums expended by the State in cleaning, preserving, restoring, and cataloging the items.

The standard by which we evaluate salvage awards is set out in *Compania Galeona, S.A. v. M/V Caribbean Mara*, 565 F.2d 358, 360 (5th Cir.1978): "[A]ppellate courts will not disturb a salvage award unless it is based on erroneous principles or a misapprehension of the facts or is so grossly excessive or inadequate as to be deemed an abuse of discretion." Under this standard, we find several problems with the district court's award.

A. Co-Salvors.

It is undisputed that Platoro performed its salvage services as a joint venturer with two others, William E. Kenon, Jr. and George K. Purvis, and that each joint venturer had a one-third interest in the project. Texas argues that a well-established rule, that the share of a salvage award due to nonsuing co-salvors goes to the owner rather than the suing co-salvors, requires that Platoro's recovery be limited to one-third of the award. Platoro responds that Texas has not raised this point before, and that in any event Platoro was suing as a representative of the joint venture.

We find that Platoro was not suing in a representative capacity, since it nowhere raised the point in its pleadings. It is also unclear whether the Texas legislature authorized a representative suit, since the

resolution merely permits "Platoro Limited, Incorporated" to sue "for whatever relief to which *it* may be entitled." (emphasis added).

There are no indications of intent to permit a representative suit similar to those which compelled us to find that the resolution permitted a suit in admiralty. Platoro never alleged in the pre-resolution litigation that it was suing as a representative, nor did the earlier opinions focus on the issue. The facts that all the previous litigation had been in admiralty and that the legislature changed its mind about a waiver once there was a definitive eleventh amendment ruling carried great weight in our decision that the waiver applied to a suit in admiralty. There are no similar circumstances indicating intent to permit a representative suit. We therefore find that the waiver does not permit a representative suit, and thus Platoro could not recover for its co-salvors;[14] we also find that Platoro did not in fact sue in a representative capacity.

It is a well-established rule of salvage law that, when one co-salvor sues but others do not, the share of the award due to the nonsuing co-salvors goes to the owner, not to the suing co-salvor. *The Blackwall,* 77 U.S. (10 Wall.) 1, 19 L.Ed. 870 (1869); Norris, *supra,* § 222. Ordinarily, once a court determines the total salvage award, which takes into account the contributions of both suing and nonsuing co-salvors, its allocation among co-salvors is made according to each co-salvor's contribution to the recovery. *The Blackwall,*

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14. The fact that there is an eleventh amendment problem obviates any need for Texas to have raised this issue below. *Ford Motor Co. v. Department of Treasury,* 323 U.S. at 467, 65 S.Ct. at 352 (eleventh amendment issue sufficiently jurisdictional to be raised for first time on appeal). The *Platoro II* court did not deal with the question, which indeed could not then have arisen, since *Platoro II* dealt with pretrial motions. 614 F.2d at 1053. Our consideration of this issue is thus not foreclosed by the law of the case.

supra; Norris, *supra,* §§ 229-30. In this case, however, once the amount due to the joint venture is determined, we see no reason to disturb the arrangement made by the venturers to share equally in the results of their work. Platoro is therefore entitled to only one-third of the salvage award to the joint venture.

B. The Nature of the Award.

We cannot find a case where the salvage award was expressed in terms of the *res* rather than in dollars, except where the salvage award was made alternatively with an award of title to the *res* under the law of finds. *See Treasure Salvors,* 569 F.2d at 337; *Brady v. The Steamship African Queen,* 179 F.Supp. 321, 324 (E.D.Va.1960). In this case, where Texas has a strong interest in keeping the *res* because of its historical significance to the State, it is particularly inequitable to compel its sale at this juncture.

It is also unfair simply to establish the salvage award as equal to the present value of the *res,* because Texas has expended a great deal of money cleaning, preserving, and cataloging the artifacts, thus presumably increasing their value. It is a general principle of property salvage law that the award should not exceed the value of the *res* as recovered. If the award exceeded that value, the owner would be not benefited but burdened by the service, a result contrary to the goals of salvage law. *See,* Norris, *supra,* §§ 1, 232. This is true even where the salvor's expenses exceed the value of the *res;* in that case, the salvor's actions have caused a net economic loss to society, also contrary to the result sought by salvage law. *See id.* § 235. The maximum allowable total award in this case, then, would be the value of the *res* as it was recovered by Platoro and its co-salvors.[15]

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15. The total award must include the contributions of *all* co-salvors. If the intervenors Burke and Algoe, or indeed anyone other

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On remand, the district court should establish a dollar value for the *res* as recovered, and use that in its consideration of the factors on which a salvage award is based.[16] The court should arrive at a dollar figure for the total value of the salvage services rendered, which should not exceed the value of the *res*. It must then determine what portion of the award should go to the joint venturers. Platoro will be entitled to a judgment for one-third of the award to the joint venturers, and to a lien against the *res* to secure payment of the judgment.

V. ATTORNEYS' FEES AND INTEREST.

Finally, Texas attacks the trial court's award of attorney's fees and interest. Texas alleges that the court failed to consider the factors to evaluate in awarding attorney's fees set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), and that the

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than the joint venturers rendered compensable salvage services, their contributions must also be taken into account in determining the total award.

16. The district court correctly set forth the relevant factors in its opinion:

1. the degree of danger from which the lives and property are rescued;
2. the vaule of the property saved;
3. the risk incurred by the salvors in securing the property from the impending peril;
4. the promptitude, skill and energy displayed by the salvors in rendering the service and saving the property;
5. the value of the property employed by the salvors in rendering the service and the danger to which such property was exposed; and
6. the time and labor expended by the salvors in rendering the salvage services.

Platoro, Ltd. v. Unidentified Remains of a Vessel, 518 F.Supp. 816, 821 (W.D.Tex.1981). They were originally delineated in *The Blackwall*, 77 U.S. (10 Wall.) 1, 14, 19 L.Ed. 870 (1869).

amount of the award is unsupported by the evidence. Texas also seeks clarification whether the attorneys' fees are to come from the salvage award or directly from the State. The State's final assertions are that the award of prejudgment interest at a rate of 9% was excessive, since Texas law would only permit a rate of 6%, and that interest should only be awarded from the date Platoro filed this suit, not from the date Texas received the *res*.

A. Attorneys' Fees.

The district court's entire discussion of attorneys' fees was four sentences long, and made no reference to the *Johnson v. Georgia Highway Express* standards.[17] Because of that, we would vacate the award and remand for specific findings on those factors even if the award were otherwise justifiable. We hold, however, that it is not.

Platoro concedes in its brief on appeal that the attorneys' fees should be charged against the "salvage fund." We have held, however, that Platoro is not en-

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17. In *Johnson*, we instructed district courts to award attorneys' fees only after making findings on: (1) the time and labor required of the attorneys; (2) the novelty and difficulty of the case; (3) the skill required to perform the legal services properly; (4) the extent to which the attorneys' acceptance of the case precluded other employment opportunities; (5) the customary fee for similar legal work in the community; (6) whether the arrangement between the attorneys and the client was for a fixed or a contingent fee; (7) the time limitations imposed on the attorneys by the client or by circumstances; (8) the amount involved in the case and the result obtained by the attorneys; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case and the possible economic repercussions for attorneys who take an unpopular case; (11) the nature and length of the attorneys' professional relationship with the client; and (12) fee awards made in similar cases. 488 F.2d at 717-19. In the absence of such findings, we have no basis on which to review an award of attorneys' fees.

titled to the entire fund; we must therefore consider whether the attorneys' fees must come entirely out of Platoro's portion.

In *Boeing Co. v. Van Gemert,* 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980), the Supreme Court faced a related question: Whether attorneys' fees awarded in a class action suit could be assessed proportionately against the unclaimed portion of the fund. The Court recognized that a lawyer who recovers a common fund for the benefit of persons in addition to his client is entitled to receive his fees from the fund as a whole; this is "a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees." *Id.* at 478, 100 S.Ct. at 749 (citing *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)). The basis for the exception is to spread the costs proportionately among those benefited by the suit. *Id.* The Court held that the requirements for the application of the common-fund doctrine were met by a class action, where "each member of a lump-sum judgment ... [and] members of the class can obtain their share of the recovery simply by proving their individual claims against the judgment fund." *Id.* at 479, 100 S.Ct. at 749-50. The Court noted the inequity of permitting claimants to benefit from the fund without bearing the costs of the litigation.

The Court stated that the use of the common-fund doctrine in the case before it was "consistent with the American rule against taxing the losing party with the victor's attorney's fees." *Id.* at 481, 100 S.Ct. at 750-51 (citing *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)). This was because the district court had awarded the entire fund to the class, so that Boeing had no interest in the fund. All it had was the possibility of asserting a right to the refund of any money left unclaimed.

Boeing clearly differs from the case before us in vital respects. Platoro has not established a fund from which the nonsuing co-salvors can simply claim their shares; on the contrary, the co-salvors must receive their own waivers of Texas' eleventh amendment immunity before they can recover anything, and such waivers are wholly within the discretion of the Texas legislature. Further, Texas has an immediate right to the portion of the fund not awarded to Platoro. Thus in this case there is not basis for the application of the common-fund doctrine: there is no danger that the nonsuing co-salvors would be unjustly enriched, and application of the doctrine would effectively tax attorneys' fees against Texas. The entire award of attorneys' fees would therefore have to come out of Platoro's share of the fund.[18]

In admiralty cases, however, it is the general rule that attorneys's fees are not awarded. *Noritake Co. v. M/V Hellenic Champion*, 627 F.2d 724 (5th Cir.1980). Platoro cites *Compania Galeana, S.A. v. M/V Carribean Mara*, 565 F.2d 358 (5th Cir.1978), for the proposition that such an award lies in the discretion of the admiralty court. We pointed out in *Noritake*, however, that *Compania Galeana* clearly referred to an exception to the rule: that attorneys' fees may be awarded where the nonprevailing party has acted in bad faith. *Noritake*, 627 F.2d at 731 n. 5. Aside from the fact that there is no proof that Texas acted in bad faith, it makes no sense to apply the exception to a case such as this, where the attorneys' fees would come from the client's recovery

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18. We thus need not address the question whether an award of attorneys' fees against Texas would be barred by the eleventh amendment, and if so, whether the waiver extended to such an award.

rather than from the opposing party.[19] We therefore vacate the award of attorneys' fees and instruct the district court to allow Platoro and its counsel to settle the question between themselves.

B. Interest.

Finally, Texas disputes the award of prejudgment interest accruing at a rate of 9% rather than 6%, and from the time Platoro returned the *res* to Texas (1968 or 1969) rather than from the time Platoro filed this suit (1977). We do not find merit in the State's contentions.

Texas somewhat misconceives the trial court's action. The only mention of interest occurs in the court's discussion of the value of the time and labor expended by the salvors. The court found that value to be $140,000, "to which Platoro is entitled plus 9% prejudgment interest dating from the time Texas took the res." The value of time and labor, however, is only a factor in the award, not the award itself. Since the court never established a dollar amount for the award, it never explicitly calculated interest theron. There was thus evidently no award of interest from which to appeal. We will nonetheless discuss the issue, for the district court will confront it on remand.

As a general rule, prejudgment interest is allowed in admiralty cases. It is not a penalty, but compensation for the use of funds wrongfully withheld. In may be denied only where peculiar circumstances make its granting inequitable. *Noritake Co. v. M/V Hellenic*

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19. There is another exception to the rule against the award of attorneys' fees in admiralty cases: they may be allowed to an indemnitee in a suit against his indemnitor, as part of the reasonable expenses of defending against the claim. *Noritake*, 627 F.2d at 731-32 n. 5. This exception is clearly inapplicable to the case before us.

Champion, 627 F.2d at 728-30; *In re M/V Vulcan*, 553 F.2d 489 (5th Cir.), *cert. denied*, 434 U.S. 855, 98 S.Ct. 175, 54 L.Ed.2d 127 (1977). On remand, the district court should determine whether such circumstances exist, and if they do not it should award prejudgment interest. The interest should be calculated on Platoro's share of the fund, not on the element of time and labor.[20]

Texas' argument that interest should accrue only from the date of filing suits disregards the purpose of the award. It is to compensate Platoro for the fact that Texas has had the use of the artifacts since 1968 or 1969, while Platoro has not had the use of the salvage award to which it was entitled. *Noritake*, 627 F.2d at728. Any interest awarded should therefore accrue from the time at which Platoro became entitled to a salvage award, i.e., when the *res* was returned to Texas.[21]

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20. Because prejudgment interest is as a rule granted in admiralty cases, *Noritake, supra*, we hold that the resolution of waiver, since it permitted an admiralty suit, necessarily consented to an award of prejudgment interest. Further, the policies of salvage law do not require that the salvage award plus interest thereon be less than the value of the *res* as recovered. The salvage award itself must be so limited to discourgage economically inefficient acts of salvage. Interest, however, attempts to compensate the salvor for the delay between rendition of the service and compensation for it. Since it is merely compensatory, it does not provide additional incentive to salvage property not worth the cost of rescuing. On the other hand, restricting the salvage award plus interest to the value of the *res* would give the owner a reason to delay payment, at least where the salvage award alone would be near the value of the *res*, because during the delay the owner would in effect have the free use of the money to which the salvor was entitled.

21. We have no difficulty in finding that the resolution of waiver permits an award of interest antedating it. Interest from the date of loss is the usual admiralty rule. *In re M/V Vulcan*, 553 F.2d 489 (5th Cir.), *cert. denied*, 434 U.S. 855 98 S.Ct. 175, 54 L.Ed.2d 127 (1977), Texas consented to a suit in admiralty, and thus absent an express limitation in the waiver consented to the usual incidents of such a suit.

This is the usual rule: admiralty courts ordinarily award interest from the date of loss. *In re M/V Vulcan, supra; Geotechnical Corp. v. Pure Oil Col,* 214 F.2d 476 (5th Cir.1954).

Texas' final contention is that the rate of any prejudgment interest allowed should be limited to 6%, rather than the 9% rate used by the district court in its discussion. The premise of this argument is that the admiralty court is bound by the rate set by the law of the state in which it sits.

This premise is false. Admiralty courts have discretion in setting the rate of prejudgment interest. *Gator Marine Service Towing, Inc. v. J. Ray McDermott & Co.,* 651 F.2d 1096 (5th Cir.1981); *In re M/V Vulcan, supra; Geotechnical Corp. v. Pure Oil Co., supra.* They may be guided by state law, *Gator Marine, supra; Geotechnical Corp., supra,* but they are not bound by it. The court in *M/V Vulcan, supra,* for instance, looked to the injured party's costs of borrowing. 553 F.2d at 491. We cannot therefore instruct the district court to use any particular rate; the decision in the first instance must lie with the district court after it evaluates the circumstances of the case.

VI. SUMMARY.

We find that Texas had waived its eleventh amendment immunity and consented to this suit. We further find that there was marine peril, that Texas did not reject Platoro's services, and that Platoro did not embezzle the *res* so as to forfeit its right to a salvage award. We therefore affirm that portion of the district court's judgment which held that Platoro was entitled to a salvage award.

We vacate the district court's award of the *res,* however, and remand for a determination of a dollar

amount, not to exceed the value of the *res*. We further instruct the district court to award Platoro one-third of the joint venture's share of that amount, and to grant prejudgment interest on Platoro's award from the time Texas took possession of the *res*, unless the district court finds that the circumstances of the case would make the grant of interest inequitable. The rate of interest is in the sound discretion of the district court. Finally, we vacate the award of attorneys' fees and instruct the district court not to grant them on remand.

Each party shall bear its own costs.

The judgment of the district court is AFFIRMED in part, VACATED in part, and REMANDED with instructions.

APPENDIX B

Memorandum Opinion and Order
of the United States District Court
for the Western District of Texas

Rendered May 6, 1981

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.

No. A-77-CA-112

518 F. Supp. 816 (1981)

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

PLATORO LIMITED, INC.,	§	
v.	§	No. A-77-CA-112
THE UNIDENTIFIED REMAINS OF A VESSEL, her cargo, apparel, tackle, and furniture in a cause of salvage, civil and maritime	§	

MEMORANDUM OPINION AND ORDER

This is a proceeding in rem brought by Platoro, Ltd., Inc., Salvors, under the admiralty jurisdiction of this Court for title to the res found under the maritime law of finds or, alternatively, for title as a salvage award for services rendered in the recovery of certain artifacts from a 16th century Spanish galleon found in Texas' territorial gulf waters. The State of Texas appeared originally in this suit as an intervenor claiming title as owner by sovereignty. Jefferson T. Burke and Billy Russell Algoe also appear as intervenors, claiming also as salvors.

I. Introduction

In 1967, Platoro located the wreck of the sunken galleon in navigable waters just off the coast of Texas. In September of 1967, salvors proceeded to remove 10 to 15 feet of sand covering the vessel and to recover some

of its treasures. The State of Texas learned of Platoro's salvage efforts and, in December of 1967, was successful in obtaining an injunction in state court enjoining Platoro from further salvage operations. The matter has been in litigation ever since.

Platoro first filed this same cause of action for salvage in 1969 in the Southern District of Texas. Immediately prior to hearing in that court, the State dismissed its cause of action (under Texas Penal Code art. 147b) against Platoro in a state district court. In 1973, the Court in the Southern District entered judgment for Platoro, which the Fifth Circuit reversed and remanded with directions to dismiss for lack of jurisdiction. *Platoro Ltd., Inc.v. Unidentified Remains of a Vessel*, 371 F.Supp. 356 (S.D. Tex. 1970), *reversed*, 508 F.2d 1113 (5th Cir. 1975).

In reversing the Court in the Southern District, the Fifth Circuit noted in dictum that the district court's disposition of the res (title to the State, recovery for salvage services to be had from the State) raised serious Eleventh Amendment questions.

Platoro, therefore, sought consent from the Texas Legislature to bring suit against the Treasury of Texas in the event that adjudication on the merits in the proper federal court would again result in Platoro's having to recover for its salvage services from the State. Consent was denied in the next legislative session; nevertheless, in 1976, Platoro again filed suit, this time in the Western District, ostensibly to toll the running of the statute of limitations. The Western District promptly dismissed the suit for want of jurisdiction, citing the Eleventh Amendment. This 1976 order was not appealed, but in May of 1977 Platoro was successful in obtaining the Legislature's permission to sue the State, and this suit was filed in June, 1977. In November, 1977, this Court, Judge Roberts presiding, held that the ac-

tion was barred by the statute of limitations and dismissed the suit. In 1980 the Fifth Circuit reversed and remanded for a determination of the merits. *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 614 F.2d 1051. Trial on the merits was had in this court beginning on March 30, 1981.

II. Title

In an in rem proceeding of this type, the salvor brings suit against the res salved to recover for his services. He has an automatic lien and a right to possession of the res against all others, including the owner. To execute his lien, the salvor files suit in a court of admiralty and other parties having claims to the res appear by way of intervention, declaring their claims to the res. The court reviews the interests claimed, orders the res sold by the Marshal at a public sale, and distributes the proceeds according to its findings on the various interests claimed.

In this suit, however, the State of Texas claimed it owned the res as a matter of law and, therefore, Platoro's salvage claim against the State/owner was barred by the Eleventh Amendment.

The State asserted ownership of the sunken treasure ship under several theories. The first of these was the British common law doctrine of sovereign perogative, which allows ownership of an abandoned wreck to revert to the sovereign a year and a day after abandonment by the true owner. Texas claimed under this theory by virtue of the succession of governments which owned the land in which the ship was found buried. This theory is without merit[1], but the Court is bound by the doctrine of res judicata to rule as though it were the law.

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1. The last transfer of sovereignty supposedly was the Submerged Lands Act of 1953, by which Congress released to Texas the extent of the federal government's ownership and control over the

(footnote continued on following page)

In 1976, this Court, speaking through Judge Roberts, entered an order awarding title to the State of Texas by virtue of its sovereignty, dismissing Platoro's salvage

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land submerged three leagues out into the Gulf of Mexico. The Act did not, however, purport to erode maritime law which governs any activity relating to navigation or commerce on navigable waters.

Historically, federal courts sitting in admiralty have had jurisdiction in actions concerning salvage where the service has been performed on navigable waters and operated to reintroduce items of value to streams of commerce. To read the Act to encroach upon traditional maritime jurisdiction would present a conflict of laws of constitutional dimension. Salvage service is performed upon and in navigable waters and is unrelated to law governing the submerged land beneath those waters. Conceivably, the owner of the submerged land could have an action in trespass against a salvor who was disturbing the submerged land, but action for trespass would have to arise from a state statute specifically setting forth the proscribed activity. Texas proffered its own statute governing submerged lands which in 1967 read: "Unauthorized encroachment upon and use of the submerged lands and islands owned by the state shall be prevented...." TEX.REV.CIV.STAT.ANN.art. 5415(e)(c) (as it existed in 1967). Reading further, however, the statute defines submerged lands to *exclude* "land within the jurisdiction of the State of Texas which lies beneath the open waters of the Gulf of Mexico." *Id.* at (2)(e). Hence, that statute does not control.

Texas next proffered another statute from the same chapter governing public lands, Art. 5421 T.R.C.S., which says that the Land Commissioner shall report to the Attorney General the names of persons who have appropriated any property of value from public lands, and the Attorney General shall bring suit for the value of such property in the county where the injury occurs. No such suit was filed by the Attorney General, and this Court sitting in admiralty has no jurisdiction over such claim.

The third statute Texas urged was Art. 147b of the Texas Penal Code which regulates the exploration for archaeological objects within the State of Texas. This statute was passed before any of the submerged Gulf lands became part of Texas; obviously, the Texas Legislature never intended it to apply to digs in the submerged Gulf lands. Moreover, it is not clear from the statute that the

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claim as jurisdictionally barred by the Eleventh Amendment. That order was not appealed, apparently because the Fifth Circuit had already indicated that a salvage suit against the State had Eleventh Amendment problems. Platoro did not oppose the State's Motion to Dismiss nor did it appeal the order which reached and adjudicated the substantive issue of title which was an essential prerequisite to the dismissal for want of

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salvaging of a sunken ship is an excavation of an archaelogical site. In order to withstand constitutional muster, the statute would have to more specifically proscribe the salvaging of buried treasure ships.

Assuming arguendo that the Texas Legislature intended for the statute to apply to excavations of sunken ships, the law of Texas regarding finds precludes the State from claiming title to the find. *Schley v. Counch*, 284 S.W.2d 333 (Tex. 1915). In Texas, according to *Schley*, the finder of lost buried property is keeper. Other jurisdictions distinguish between lost property and lost property found embedded in the soil. *See Burdick v. Chesebrough*, 88 N.Y.S. 13 (NY App. 1904) (earthenware found embedded in soil, *Allred v. Biegel*, 219 S.W.2d. 665 (Mo. App. 1949) (ancient Indian canoe embedded in river bank) and *Elwes v. Brigg Gas Co.*, 33 Chancery Division English Law Reports 562 (1886) (prehistoric boat found buried in mud). Texas, however, does not. Therefore, even according to Texas common law, the finder of buried treasure is keeper.

It is the Court's impression at this time that the State's intervention in this suit has been misconceived ab initio; the State of Texas, by claiming title by sovereign perogative, has ignored the fact that the British common law doctrine of sovereign perogative has been absorbed into the law of admiralty; the courts sitting in admiralty take the res into their registries, as did the British sovereign, and disburse the expense for salvage and other costs concerning the res as they are claimed or incurred. The State of Texas has tried relentlessly to divest this Court of its admiralty jurisdiction by asserting its claims of sovereignty. This effort misconstrues the laws of admiralty.

jurisdiction. *See Kerbow v. Kerbow,* 421 F.Supp. 1253 (N.D.Tex.1976). Therefore, regardless of the accuracy of the application of the law reflected in that order, this Court is precluded from applying the maritime law of finds as recently enunciated by the Fifth Circuit in a very similar and instructive case, *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel,* 569 F.2d 330 (5th Cir. 1978).[2]

The Court is aware of authorities which imply that res judicata is not an absolute bar where between the time of the first and second judgments an important new decision alters the state of the law. *State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 154 (1945). None of the cases which follow that line of authority appear to involve a party who actually failed to appeal an appealable judgment, and this Court declines to reach for an exotic exception to the doctrine of res judicata when Platoro failed to assert its rights at the proper time.

An interesting hypothesis that the Court does not endorce at this point is that Texas' ownership of the res (by virtue of the doctrine of res judicata) does not preclude application of the maritime law of finds in awarding the res to the salvor. Norris suggests in his treatise on admiralty that an owner may lose or abandon his property without being deprived of his title to it. Therefore, if the State insists that it has title to the res, the Court could find that the State had abandoned the res (by never exerting any control or otherwise indicating possession of the res), and the finder of the abandoned[3] property gets to keep the find. The Court

2. The maritime law of finds is well established in American courts. *See* cases cited in *Treasure Salvors* and 63 A.L.R.2d 1369.

3. The Court recognizes that this is a fiction since the State never "possessed" the res to lose it.

finds it unnecessary to indulge this hypothesis, since the same result is reached by following a clearer path.

Although consideration of the title question is barred, the salvage lien is not barred because in 1977 Platoro did succeed in obtaining the Texas Legislature's consent to sue the State on its salvage lien and immediately filed this lawsuit. The jurisdictional defect was cured. *See* 49 A.L.R.2d 1036, at § 6(c) and cases cited therin.

III. The Salvage Award

The dispute as to whether this is a valid salvage claim was fully explicated previously by Judge Garza when the case was before him in the Southern District. 371 F.Supp. 351 (1970). The three elements of a valid salvage claim are:

(1) that marine peril exists;

(2) that the service was voluntarily rendered; and

(3) that the effort was successful in whole or in part.

Lagnos v. M/V Olga Jacob, 498 F.2d 666 (5th Cir. 1974).

The State claims that the res was in no marine peril. We dispose of this contention by noting that the res was lost and had been lost for four centuries when it was discovered by Platoro. Texas' claim that the ship was *not* lost is based on the fact that authorities knew the "general vacinity" of the vessel; when put to closer examination, this assertion amounted to a suspicion that it lay somewhere between Brownsville and Corpus Christi, Texas, or within a 150-mile expanse. Actual loss and subjection to the elements constitutes "marine peril" for the purpose of making a valid salvage claim. *See Thompson v. One Anchor and Two Chains,* 221 F. 770 (W.D.Wisc. 1915).

There is no exact measure to determine the amount of a salvage award. Comparable cases may be referred to but cannot serve as a rigid yardstick, *The Neto and Cargo,* 15 F. 819 (D.Fla. 1883); the common law rule of moiety has been "long exploded," *Taylor v. the Cato,* F.Cas. 13,786 (D.Pa. 1806); and fixed percentages are not always equitable, *The Craster Hall,* 213 F. 436 (5th Cir. 1914); *see also Post v. Jones,* 60 U.S. 150 (1856).

Public policy has long mandated a liberal salvage award so that a salvor, recognizing a vessel in distress, will have the pecuniary incentive to prompt his efforts. *The Missouri,* F.Cas. 9654f (D.Mass. 1854) and *Seven Coal Barges,* F.Cas. 12,677 (C.C.Ind. 1870). The practicality underlying the policy of encouragement is that, unless seamen are encourged to go to the aid of disabled vessels, property and sometimes life will be needlessly lost. *The Morzhovoi,* 20 F.2d 265 (D.Wash. 1927).

The elements considered by most courts in arriving at an award for salvage service are:

1. the degreee of danger from which the lives and property are rescued;

2. the vaule of the property saved;

3. the risk incurred by the salvors in securing the property from the impending peril;

4. the promptitude, skill and energy displayed by the salvors in rendering the service and saving the property;

5. the value of the property employed by the salvors in rendering the service and the danger to which such property was exposed; and

6. the time and labor expended by the salvors in rendering the salvage services.

Norris, 3A Benedict on Admiralty, *The Law of Salvage*, 7th ed, §244.

1. The Degree of Danger from Which the Property was Rescued

The State's contention that the vessel was safely embedded in and even preserved by the 10-15 foot layer of sand is not at all compelling. Platoro had no way of knowing how well preserved the vessel and its cargo would be—if and when it was found. When Platoro researched the location of the ship and even when engaged in removing the sand, it had no inkling that the sand and water would have the preserving effect they had. Moreover, Platoro has no real reason to believe that the treasure cargo was not scattered all over the floor of the Gulf, rather than collected and reposed as it actually was. The Gulf is renowned for its ferociuos hurricanes which threaten annually. This obvious danger has an effect on the topography of the sea floor, as several of Platoro's witnesses testified from personal experience.

The State's contention that the salved goods were in no danger and were exposed to no "marine peril" is based on hindsight and ignores the obvious problem that the goods were absolutely lost. The fact that the sand and salt water preserved the goods is a boon rather than a bar to a salvage claim. In addition, there was testimony that extensive seismic operations have been conducted in this area. Drilling operations for oil and gas are ongong activities. Obviously, these exploratory procedures in the quest for oil and gas might well have caused all the artifacts to be destroyed or scattered so that they never would be recovered.

It is noted that the *Santa Maria*, a sister ship of the *Espiritu Santu* (the Platoro find), sank a few scant miles away. The Corps of Engineers in constructing the channel for Port Mansfield dug right through the remains of this ship and destroyed many artifacts and ruined many others.

2. The Value of the Property Saved

Both Platoro and the State put on evidence of the value of the artifacts salved. Platoro's experts were current in their knowledge of the field of marine artifacts and based their estimates on commercial value both at the time of the find and presently. Particularly was the Court impressed (as was Judge Garza at the trial in the Southern District) by the testimony of Mendel Peterson who evaluated the market value of the metal artifacts (before the State's restoration) at $241,082.00. Another credible witness testified that the market value of the armaments (presumably the non-metal artifacts) was approximately $26,000.00.

In addition, the State's witnesses testified extensively to the great contribution this find made to the fields of history and marine archaeology. The State, of course, did not assign a dollar figure to such value.

3. The Risk Incurred by the Salvors

The salvors testified concerning the varied dangers to which they were exposed during the salvage operation: severe undertow, fish of the deep, inclement surface weather, and the danger of the salving vessel's propeller in conjunction with the use of the deflection shield. This testimony was virtually uncontroverted.

4. The Promptitude, Skill & Energy in Rendering the Service

This element is the least applicable to Platoro's salvage service since promptitude is relative to the necessity for promptitude; however, the evidence was that Platoro's crew was diligent in its efforts, stopping its operation only when the weather and the State so dictated. Most of the salvors were experienced divers, and several were experienced salvors. This Court declines to hold them to the standard of expertise required of marine archaeologists, as the State has urged.

5. The Vaule of the Property Employed by the Salvors and the Danger to Which It was Exposed

The salvors put on evidence that, to move the thick layer of land covering the vessel, they designed and used special innovative equipment which has been successfully copied and used in other salvage efforts. Witnesses testified that the equipment they used was standard salvaging equipment used in Gulf salvage operations. The equipment was not exposed to any extraordinary danger (other than hurricane Beulah).

6. The Time and Labor Expended by Salvors

Platoro submitted a reasonable estimate of the man-hours and equipment-hours expended in the salvage effort, totaling approximately $140,000.00 to which Platoro is entitled plus 9% prejudgment interest dating from the time Texas took the res. *See M/V Vulcan*, 553 F.2d 489 (5th Cir. 1977).

Intervenors Burke and Algoe submitted similarly reasonable estimates of their time, but, although they were party to the salvage effort from the beginning, their claim is impeded by an Eleventh Amendment jurisdictional bar. The 1977 legislative consent to sue the State extends only to Platoro. Algoe and Burke were independent salvors and did not obtain consent to sue the State.

IV. Conclusion

Based on the above facts and underlying policy considerations, the Court finds that Platoro's adequate and just salvage award is equal to or perhaps in excess of the sum which a sale would bring. Therefore, it will allow the State to satisfy judgment by relinquishing title of the res to Platoro. If the State chooses not to follow this suggestion, the Court will order a public sale of the res and will award the entire proceeds of sale to Platoro, less court costs and costs of sale. *Accord, Brady v. The SS African Queen,* 179 F.Supp. 321 (D.Va. 1960). Such an award is not excessive in view of the great historical and archaelogical value the State's witnesses attributed to the find. The salvors should be amply rewarded.

The State has asked for an offset for its time and expense in restoring the artifacts after they were recovered from Platoro. The Court can find no precedent for this type of claim on an action for salvage and, therefore, holds that it is without jurisdiction to consider it. Even if the claim for offset sounded in admiralty, the Court would be reluctant to grant it since the State has had the artifacts in its exclusive possession and control since 1969.

There remains only the issue of attorney's fees. The award of attorney's fees in admiralty actions is discretionary and is specifically permitted in salvage cases. *See Compania Galeana, S.S. v. Motor Vessel CARRIBBEAN,* 565 F.2d 358 (5th Cir. 1978). Particularly here, where the State has refused to negotiate or recognize a valid salvage claim, is an award of attorney's fees appropriate. Therefore, Platoro is entitled to recover $63,800.00 in attorney's fees and court costs.

IT IS SO ORDERED.

SIGNED and ENTERED this 30th day of April, 1981.

/s/

LUCIUS D. BUNTON
United States District Judge

APPENDIX C

Judgment of the United States District Court for the Western District of Texas

Rendered May 6, 1981

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.

No. A-77-CA-112

UNITED STATES DISTRICT COURT
for the
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action File No. A-77-CA-112

Platoro Limited, Inc.	§	
	§	
vs.	§	JUDGMENT
	§	
The Unidentified Remains of a Vessel, her cargo, apparel, tackle, and furniture in a cause of salvage, civil and maritime	§	

This action came on for trial before the Court, Honorable LUCIUS D. BUNTON, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged and Decreed that judgment is hereby entered in favor of Plaintiff, Platoro limited, Inc., and Plaintiff is granted a salvage award and is entitled to recover $63,800.00 in attorney fees and court costs. The Court finds that Plaintiff's adequate and just salvage award is equal to or perhaps in excess of the sum which a sale of the res would bring. Therefore, the State of Texas may satisfy judgment by relinquishing title of the res to Plaintiff. If the State chooses not to follow this suggestion, the Court will order a public sale of the res and award the entire proceeds of sale to Plaintiff, less court costs and costs of sale.

It is FURTHER ORDERED, ADJUDGED and DECREED that Intervenors Jefferson T. Burke and Billy Russell Algoe's salvage claim is impeded by an Eleventh Amendment jurisdictional bar.

Dated at Austin, Texas, this 6th day of May, 1981.

CHARLES W. VAGNER

Clerk of Court

By: Sally Looke, Deputy

APPENDIX D

Memorandum Opinion and Order Denying New Trial and Entry of Additional Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Texas

Rendered June 5, 1981

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.

No. A-77-CA-112

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

PLATORO LIMITED, INC., an Indiana Corporation, as Salvor	§	
v.	§	No. A-77-CA-112
The Unidentified Remains of a Vessel, Her Cargo, Apparel, Tackle, and Furniture in a Cause of Salvage, Civil and Maritime	§	

MEMORANDUM OPINION AND ORDER DENYING NEW TRIAL AND ENTRY OF ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Came on to be considered this date Intervenor's Motion for New Trial which has been considered as a Motion for Amendment of Judgment, and the Court, finding the motion to be without merit, hereby DENIES said motion.

Intervenors have approached the Court in a strange posture. At trial they put on evidence indicating that they considered themselves as part of PLATORO's crew yet they now claim that they were independent salvors who were not bound by the 1976 Order awarding title of the res to the State. The Court looked to Intervenors' conduct to determine whether their claims should be treated (1) as independent salvors claiming a salvage award under the maritime law of finds under which there

is no Eleventh Amendment jurisdictional bar or (2) as PLATORO's crew members, who were bound by the 1976 Order, and if so whether the Legislature implicitly consented to their suit. The court finds that:

1. Intervenors agreed to work with PLATORO in the salvage effort and performed as agreed.

2. Intervenors had a very loose oral agreement with PLATORO that the proceeds from the salvage effort would be split among the salvors.

3. Intervenors and PLATORO never agreed on a percentage for the split but seemed to agree that they would agree after the effort was complete.

4. At the time of the agreement, both PLATORO and Intervenors intended Intervenors' claim to be derivative of PLATORO's.

5. At some time during the salvage effort but before trial in the Southern District, Intervenors and PLATORO became disenchanted with each other and Intervenors hired their own counsel to represent them in their claim for a salvage award.

6. There was no evidence presented at trial to show whether Intervenors joined PLATORO in its effort or initiated their own effort to get legislative consent to sue the State after the Fifth Circuit indicated in its 1976 opinion that the salvors might have Eleventh Amendment problems with recovery.

7. Intervenors tried to intervene in the 1976 suit but were precluded by an early dismissal.

8. Intervenors did not join in the 1977 suit until December, 1980 when the Court orally granted their Motion to Intervene.

9. Intervenors never filed an independent cause of action against the res as independent salvors.

As independent salvors now claiming under the maritime law of finds, Intervenors are barred by the statute of limitations. *See* 46 U.S.C. §730. The considerations outlined in *Platoro v. Unidentified Remains*, 614 F.2d 1051 (5th Cir. 1980), which tolled the statute as to PLATORO do not apply to Intervenors since:

10. A period of four years ran without the intervention of legal action by Intervenors; and

11. Because of Intervenors' inactivity during this time, neither the State nor PLATORO had reason to believe that Intervenors intended to pursue their claims.

The Court's Order dated May 6, 1981, implicitly found that Intervenors considered themselves as members of PLATORO's crew at the time of the agreement with PLATORO and intended that their salvage claim be derivative of PLATORO's. Intervenors' later disassociation with PLATORO is inconclusive as to Intervenors' standing in this lawsuit. The Court concludes that the only effect of the disassociation was to necessitate that Intervenors either join in PLATORO's effort or initiate their own effort to get legislative consent to sue the State. Since there is not proof as to either, the Court finds that:

12. Intervenors did not seek nor obtain legislative consent to sue the State.

Intervenors, therefore, are now barred from recovery by the doctrine of collateral estoppel by virtue of Judge Roberts' 1976 Order.

For these reasons, Intervenors' Motion is DENIED and the Findings of Fact and Conclusions of Law includ-

ed in this Memorandum Opinion and Order are added to the Order dated May 6, 1981.

IT IS SO ORDERED.

SIGNED and ENTERED this 3rd day of June, 1981.

/S/

LUCIUS D. BUNTON
United States District Judge

APPENDIX E

Order of the United States District Court for the Western District of Texas

Rendered June 8, 1981

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.

No. A-77-CA-112

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

PLATORO LIMITED, INC., an Indiana Corporation, as Salvor	§	
v.	§	No. A-77-CA-112
THE UNIDENTIFIED REMAINS OF A VESSEL, her cargo, apparel, tackle, and furniture in a cause of salvage, civil and maritime	§	

ORDER

Came on to be considered this day Intervenors' Motion for New Trial and the Court, finding it to be without merit, hereby DENIES said motion. In the Memorandum Opinion and Order entered May 6, 1981, the Court held that Intervenors' claims were jurisdictionally barred by the Eleventh Amendment. This conclusion was based on the doctrine of collateral estoppel. The order failed to mention the Court's corollary conclusion that Intervenors' claim for a salvage award was independent of PLATORO's claim yet Intervenors did nothing to pursue the merits of their cause of action from 1976 until July, 1980 when they moved to intervene in this lawsuit. The statute of limiatitons precludes Intervenors from pursuing a cause of action at this late date. 46 U.S.C. §730. The considerations which allowed PLATORO to sue in spite of 46 U.S.C. §730 do not apply to Intervenors. *See Platoro v. Unidentified Remains*, 614 F.2d 1051, 1055 (5th cir. 1980).

Although the Court has judicial power to toll statutes of limitations on equitable grounds, the Court declines to do so where the parties have so apparently abandoned their claims and where their conduct indicates quite clearly that they considered themselves in privity with PLATORO as PLATORO's agents and therefore bound by the 1976 order. Therefore, the Motion for New Trial and the implicit motion to amend the Judgment is DENIED.

SIGNED and ENTERED this 3rd day of June, 1981.

/S/

LUCIUS D. BUNTON
United States District Judge

APPENDIX F

Opinion of the United States Court of Appeals for the Fifth Circuit

Rendered April 4, 1980

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.

No. 78-1052

614 F.2d 1051 (1980)

PLATORO LIMITED, INC.,
Plaintiff-Appellant,
v.

The UNIDENTIFIED REMAINS OF A VESSEL, her cargo, apparel, tackle, and furniture, in a cause of salvage, civil and maritime, *Defendants-Appellees.*

No. 78-1052.

United States Court of Appeals,
Fifth Circuit.

April 4, 1980.

Rehearing and Rehearing En Banc
Denied May 8, 1980.

Appeal from the United States District Court for the Western District of Texas.

Before AINSWORTH and HENDERSON, Circuit Judges, and HUNTER,* District Judge.

AINSWORTH, Circuit Judge:

Plaintiff Platoro Limited, Inc. appeals from a judgement of the United States District Court for the Western District of Texas dismissing its suit *en rem* to obtain title to the unidentified remains of a Spanish vessel abandoned over 400 years earlier (in 1554) and resting on the bottom of the Gulf of Mexico off the coast of Padre Island, Texas. Alternatively, plaintiff sought

* District Judge of the Western District of Louisiana, sitting by designation.

reasonable compensation for salvage services in recovering the vessel. Plaintiff requested issue of process against the State of Texas pursuant to a resolution of the Texas Legislature which authorized suit against it. The court held that plaintiff's suit was barred by the applicable statute of limitations and granted the State of Texas' motion to dismiss. We reverse and remand.

On September 11, 1967, Platoro, an Indiana corporation, commenced operations for recovery of the remains of a 16th century Spanish ship which was found buried under a layer of sand 30-40 feet of water in the Gulf of Mexico.[1] Thereafter, on December 13, 1967, the State of Texas filed suit in the 28th Judicial District Court of Kenedy County, Texas, to enjoin Platoro from further recovery operations. The injunction was issued on December 31 and Platoro ceased all activities. Negotiations between Platoro and the Texas Land Commissioner followed and a settlement was reached whereby Platoro and the Commissioner agreed to divide the artifacts from Indiana to state custody in Texas.

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1. The State of Texas points out in its brief that Platoro commenced recovering the artifacts in question "without permission to do business in Texas, without a permit to explore or excavate an archeological site, and without any notice to the State of Texas." However, the Texas Antiquities Code, Tex.Rev.Civ.Stat.Ann. art. 56145-9 (Vernon), which deals explicitly with the State's requirements for salvaging vessels abandoned at sea, had not been enacted at the time Platoro engaged in its salvaging operations. Texas also argues that Platoro violated Tex.Pen.Code Ann. art. 147b (Vernon) (repealed 1969) by failing to obtain a permit or license to explore or excavate "in or on any prehistoric ruins or archeological or vertbrate paleontological site in Texas," and

(footnote continued on following page)

On August 6, 1969, approximately 19 months after its operations had ceased, and upon realizing that the Stae was not going to honor its agreement with the Commissioner, Platoro filed an *in rem* action in federal court in the southern District of Texas to obtain title to the artifacts recovered or, alternatively, reasonable compensation for salvage services. The district court held that plaintiff Platoro was entitled to compensation for its salvaging operations and awarded judgement in the amount of $131,248. *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel,* 371 F.Supp. 356 (S.D.Tex.1973). On appeal, this court reversed the judgment on the ground that the district court lacked *in rem* jurisdiction, since the artifacts were not located within

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(footnote continued from previous page)

Tex.Bus.Corp.Act. Ann. art. 8.01 (Vernon), by failing to obtain a certificate to transact business in the State of Texas. Whether appellant's activities were in violation of the Texas Penal Code is irrelevant to the issues involved here.

With regard to Platoro's failure to obtain a certificate to transact business in Texas, appellant may reasonably have assumed that such a certificate was not necessary considering the nature of its activities and the fact that they took place off the coast of Texas. Nonetheless, subsequent to the seizure of the artifacts by the State, Platoro filed for a Certificat of Authority to transact business in Texas, which was granted in 1969 and is still in force.

Moreover, Platoro's failure to obtain the above permits prior to commencing its salvaging activities does not prohibit it from seeking compensation in this case.

the Southern District of Texas when the suit was filed.[2] *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel*, 508 F.2d 1113 (5th Cir. 1975). The court remanded the case to the district court to dismiss the suit, which it did on May 17, 1975.

In a footnote to its opinion, this court also noted that the "preceding raises serious Eleventh Amendment questions." *Id.* at 1115 n.3. Platoro, therefore, attempted to obtain permission from the State of Texas at the next legislative session to bring suit against it. Its efforts were unsuccessful, so on May 21, 1976 it again filed suit against the State of Texas, in federal court in Western District of Texas, alleging the same claims which were set forth in the prior suit. On August 13, 1976, the district court dismissed the suit based on the Eleventh Amendment's bar to the court's jurisdiction, since the State had failed to waive sovereign immunity.

At the next session of the Texas Legislative, Platoro succeeded in obtaining a waiver of sovereign immunity by virtue of a resolution which was signed by the Governor on May 27, 1977. This suit was then commenced on June 23, and on July 18, the State of Texas moved to dismiss plaintiff's complaint for lack of jurisdiction over the subject matter and for failure to state a claim on which relief could be granted.[3] In its motion, the State asserted, among other things, that Platoro's complaint

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2. Although the sunken vessel was buried in territorial waters within the Southern District of Texas and the salvaging operations took place there prior to the time suit was brought, Platoro had removed the artifacts recovered to date to its home office in Indiana and later, pursuant to an agreement with the State of Texas, had relinquished possession of them to Texas which has continually held them in Austin in the Western District of that state.

3. When the motion was orally argued, plaintiff Platoro's counsel stated that it was proceeding solely on its claim for compensation for salvage services, and no longer asserted a claim of title to the property.

failed to state a claim for remuneration for salvage services within the court's admiralty and maritime jurisdiction; also that the claim was barred by the applicable statute of limitations, 46 U.S.C. § 730.[4] The district court held that Platoro's action was barred by the two-year limitation period set out in section 730, and thus expressly found it unnecessary to decide whether plaintiff's complaint stated a salvage claim within the court's admiralty and maritime jurisdiction. Accordingly, on November 14, 1977, the district cout dismissed plaintiff's suit and plaintiff brought this appeal.

The pertinent statutory provision, 46 U.S.C. § 730, establishes a two-year limitation period for suits for the recovery of remuneration for rendering salvage services, which period runs from the date the services were rendered. The statute contains a proviso, however, that suit may be brought after two years if "during such period there had not been any reasonable opportunity of arresting the ... salvaged vessel within the jurisdiction of the court." The action which precipitated this appeal was not commenced until July 1977, more than nine years after the slavage services were rendered. The artifacts made the subject of the suit were physically within the Western District of Texas at Austin since 1969 when plaintiff brought them there from Indiana. Thus, Platoro does not come within the above-quoted language of the tolling provision of the statute.

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4. 46 U.S.C. § 730 states:

A suit for the recovery of remuneration for rendering assistance or salvage services will not be maintainable if brought later than two years from the date when such assistance or salvage was rendered, unless the court in which the suit is brought shall be satisfied that during such period there had not been any reasonable opportunity of arresting the assisted or salved vessel within the jurisdiction of the court or within the jurisdiction of the court or within the territorial waters of the country in which the libelant resides or has his principal place of business.

Nevertheless, the mere fact that a federal statute providing for substantive relief also sets a time limitation upon the institution of suit under the statute does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose. *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 559, 94 s.Ct. 756, 769, 38 L.Ed. 713 (1974); *Leake v. University of Cicinnati*, 605 F.2d 255, 259 (6th Cir. 1979); *cf. Mizell v. North Broward Hospital District*, 427 F.2d 468 (5th cir. 1970). Judicial power to toll statutes of limitations on equitable grounds was firmly established in *Burnett v. New York Central Railroad*, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965). *Burnett* involved the dismissal for improper venue of an action filed in state court under the Federal Employers' Liability Act. At the time suit was later commenced in the proper district but in federal court, the limitations period established by the Act had already run. The Court noted that the period is not totally inflexible, but under appropriate circumstances may be extended. The basic question is whether tolling the statute in a particular case is in keeping with the legislative intent underlying the Act itself. 380 U.S. at 426, 85 S.Ct. at 1053. In noting that statutes of limitations are designed primarily to assure fairness to defendants by preventing the revival of claims that have been allowed to slumber until evidence has been lost and witnesses have disappeared, the Court pointed out that this "policy of repose" is frequently outweighted where "the interests of justice require the vindiction of the plaintiff's rights." 380 U.S. at 428, 85 S.Ct. at 1054-55.

Tolling of the statute of limitations under the circumstances here is warranted to allow Platoro an opportunity properly to pursue its claim on the merits. Here, the vessel from which the artifacts were retrieved was located in the Southern district of Texas at the time Platoro's first suit was instituted, and the recovery

operations made the basis of the suit took place there. It was not unreasonable for Platoro to assume these facts were sufficient for a determination that the court had proper jurisdiction over the rest. In fact, the district court so held, although erroneously. *Platoro Limited, Inc., supra*, 371 F.Supp. at 358-59. It would not be inconsistent with the legislative intent underlying the statute at issue to avoid the injustice that would result from the dismissal of Platoro's claim because it made an erroneous choice with regard to the true location of the subject matter of the suit.

Furthermore, filing of Platoro's first lawsuit showed "proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure." *Goldlawr, Inc., v. Heiman*, 369 U.S. 463, 467, 82 s.Ct. 913, 916, 8 L.Ed.2d 39 (1962). Appellant was not dilatory in attempting to preserve its claim. After the State of Texas filed suit, Platoro negotiated an agreement with the State Land Commissioner to divide the artifacts. When it appeared that the State was not going to honor the agreement, appellant filed its suit well within the two-year period. When the decision in that case was reversed on appeal and this court noted that the proceeding raised serious Eleventh Amendment questions, Platoro apparently realized that a waiver of sovereign immunity would likely be necessary for a successful claim against the State. After failing to get a consent to suit resolution from the State at the next legislative session, Platoro filed suit once again in order to protect its claim. After that action was dismissed, appellant successfully obtained a waiver of sovereign immunity from the Texas Legislature. Platoro brought the present suit within three weeks of the signing of the Texas Legislature resolution. At no time did a period of two years run without the intervention of legal action by appellant. Moreover, the State of Texas has been cognizant of this claim from almost the beginning. Texas initiated the controversy by filing suit for injunctive relief

in 1967. At that time the State was aware that Platoro claimed compensation for salvaging the artifacts.

In the final balance, therefore, the circumstances favor tolling the statute of limitations and granting Platoro the right to have its claim adjudicated.[5]

We next consider the question whether Platoro's complaint states a claim for compensation for salvage services cognizable within the court's admiralty and maritime jurisdiction. The State of Texas argues that one of the elements of a salvage action—the existence of a marine peril—is absent from this controversy,[6] since the vessel has been "rest[ing] peacefully on the floor of the Gulf of Mexico for over 400 years," and is not "suffering from an impending peril of the sea." We disagree.

In a strikingly similar case, this court recently decided that a party claiming an award for the salvage of a vessel abandoned at sea could properly proceed under the court's admiralty jurisdiction. *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel,* 569 F.2d 330 (5th Cir. 1978). We said in that case that a "[m]arine peril includes more than the

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5. In view of our holding, we find it unnecessary to announce a broad rule regarding Platoro's contention that the statute of limitations did not begin to run until Texas gave its consent to suit. *See United States v. Fuston,* 143 F.2d 76 (10th Cir. 1944). Platoro's efforts to preserve its claim have operated in each instance to toll the statute sufficient to prevent a bar to maintaining its present suit.

6. it is well established that in order to present a valid salvage claim three elements must be shown: "(1) a marine peril, (2) service voluntarily rendered when not required as an existing duty or from a special contract, and (3) success in whole or in part, or that the service rendered contributed to such success." *Legnos v. M/V Olga Jacob,* 498 F.2d 666, 669 (5th Cir. 1974). Texas complains that only the first of these elements is lacking.

threat of storm, fire or piracy to a vessel in navigation."[7] *Id.* at 337. Thus, a marine peril existed in a wrecked and abandoned vessel, which sank in 1622 off the Marquesas Keys in waters off the Florida coast, and whose location was unknown for over 300 years. Further, the court said that this peril existed even after discovery of the location of the vessel, since it was "still in peril of being lost through the actions of the elements."[8] *Id.* at 337.

Our decision in *Treasure Salvors* is thus dispositive for the issue whether appellant properly invoked the court's admiralty jurisdiction in its claim for compensation here.[9] We therefore, hold that Platoro's complaint state a valid salvage claim and remand this case to the district court for a determination of the merits.

REVERSED AND REMANDED.

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7. In a footnote, the court noted that "'[t]he peril required in a salvage service need not necessarily be one of imminent and absolute danger. The property must be in danger, either presently or reasonably to be apprehended.'" *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 n.13 (5th Cir. 1978), *quoting* Norris, The Law of Salvage § 185 (1958).

8. In our earlier statement that the vessel was resting on the bottom of the Gulf of Mexico, 30 to 40 feet under water, covered by 4 to 10 feet of sand, thus "impervious to weather conditions above the surface of the seas," with the "sand prevent[ing] deterioration underwater,"*Platoro Limited, Inc. v. Unidentified Remains of a Vessel*, 508 F.2d 1113, 1114-15 n.1 (5th Cir. 1975), the court was not addressing the issue whether amarine peril existed for puroposes of determining if plaintiff presented a valid salvage claim. Later, when we squarely considered the question in *Treasure Salvors, supra*, we determined that such conditions present a marine peril for purposes of meeting the requirements of a valid salvage action.

9. The State of Texas makes much of the fact that in *Treasure Salvors, supra*, the vessel was abandoned partially in international waters, wheeas here the wreck lay in territorial waters off the Texas coast. This distinction, however, is not determinative of whether a marine peril existed for purposes of meeting the requirement of a salvage action.

APPENDIX G

Memorandum and Order of the United States District Court for the Western District of Texas

Rendered November 14, 1977

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.

No. A-77-Ca-112

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Platoro Limited, Inc.	*	
	*	
V.	*	Civil Action No.
	*	A-77-Ca-112
The Unidentified Remains	*	
of a Vessel	*	

MEMORANDUM AND ORDER

This is a suit in admiralty to gain title to, or alternatively to recover monetary compensation for the salvage of, certain items recovered from the shipwreck of a Spanish galleon off the coast of Padre Island. On November 4, 1977, the Court heard oral arguments on the motion of the State of Texas, a claimant, to dismiss the suit. After considering the motion, pleadings, briefs, and arguments, the Court is of the opinion the motion to dismiss should be granted.

This suit has had a checkered history which must be set out to understand fully the posture of the case in this Court. The Spanish galleon involved sank off the coast of Padre Island in the 1550's. The wreck was soon covered by a layer of sand and silt. Plaintiff, an Indiana corporation, started recovery operations in September of 1967, and ceased on December 13, 1967, pursuant to a state court injunction. Plaintiff had apparently removed many of the recovered items to Indiana. The items were returned to Austin, Texas by at least August 5, 1969, apparently pursuant to some sort of understanding between Plaintiff and the State of Texas that the parties would split the proceeds of the recovery 50-50. The Texas Land Commissioner then repudiated this understanding.

On August 6, 1969, Plaintiff filed suit in federal district court in Brownsville, Texas, making basically the same allegations as are made in this suit. That district court ultimately rendered a judgment for Plaintiff, *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel*, 371 F. Supp. 356 (S.D. Tex. 1973), but that judgment was later reversed for lack of *in rem* jurisdiction, 508 F.2d 1113 (5th Cir. 1975). The suit was then dismissed at the direction of the 5th Circuit on May 17, 1975.

In its opinion the 5th Circuit intimated that sovereign immunity might be a bar to the suit, 508 F.2d 1115 at n.3, and apparently taking this warning to heart, Plaintiff says it sought permission to sue from the next session of the Texas legislature, but was not successful. This first attempt to obtain a waiver of sovereign immunity would have occured some 7½ to 8 years after the cessation of salvage operations in 1967. On May 21, 1976, Plaintiff filed suit in this court (Civil Action No. A-76-CA-99), making the same allegations as made in the Brownsville suit and as are made in the present suit. This Court confirmed Plaintiff's fears and dismissed for failure of the State to consent to suit. Memorandum Order of August 13, 1976. No appeal was taken from that dismissal.

Plaintiff approached the following session of the state legislature and obtained a resolution, signed by the governor on May 27, 1977, authorizing suit, but expressly reserving all defenses other than that of sovereign immunity. The instant suit was then filed on June 23, 1977.

The State characterizes this suit as one in which Plaintiff is 1) suing for a declaration of title to the property recovered or, alternatively, 2) for an award for salvage services, to be secured by a maritime lien. Plaintiff says that it is not seeking a judgment of present ownership or "present title," but is only seeking an "award" of title

as part of its salvage claim. Alternatively it seeks the monetary award for salvage services.

The State has moved to dismiss for failure to state a claim or for lack of jurisdiction in admiralty. The State contends that the title issue is res judicata because of the earlier Brownsville and Austin suits. Alternatively it says that the prior statements by this Court and the Brownsville court to the effect that title of the recovered goods was in the State were correct as a matter of substantive law. As to the salvage claim, the State argues that the suit is barred by the 2-year statute of limitations in 46 U.S.C. § 730, or if not barred, that there is no jurisdiction because of a failure to allege (or be able to prove) "maritime peril," which is said to be an element of a salvage claim.

The "Title" Claim:

The Court need not devote much attemtion to the title question inasmuch as Plaintiff's counsel, during argument, expressly disavowed any claim to title and said Plaintiff was pursuing only its claim for a monetary salvage award. We note only that the disagreement between the parties concerning how to characterize the title claim appears to result from two distinct lines of cases on this type of situation. One line awards title to items recovered from an abandoned shipwreck to the first person to take possession of the goods, applying a "finders" theory. The other line of cases treats a wrecked or sunken ship as a "derelict" or "wreck of the sea" which, upon recovery, belongs to the sovereign unless claimed by the true owner within a year and a day. *See* 63 A.L.R. 2d 1360. This Court has already indicated, although perhaps only in dictum, that it feels that the latter line of cases applies to the facts alleged by Plaintiff.

The "Salvage" Claim:

46 U.S.C. § 730 states that a "...suit for the recovery of remuneration for rendering assistance or salvage services shall not be maintainable if brought later than two years from the date when such assistance or salvage was rendered..." The statute contains its own tolling provision which provides that the suit may be brought after two years if "...during such period there had not been any reasonable opportunity of arresting the...salvaged vessel within the jurisdiction of the court..."

We note intitally that "46 U.S.C. § 730 is a federal statute of limitations which contains its own tolling provisions" and that "[t]here has been no tendency on the part of the judiciary to erode the plain meaning of this statute." *People of the Living God v. Star Towing Co.*, 289 F. Supp. 635, 638-39 (E.D. La. 1968)(order of quotations reversed). *See also Basic Boats, Inc. v. United States*, 311 F. Supp. 596 (E.D. Va. 1970); *Ticc Towing Line v. James McWilliams Blue Line*, 57 F.2d 183 (2d Cir. 1932); *Cavanaugh v. The Lenco II*, 102 F. Supp. 213 (S.D. N.Y. 1951); *Canadian Government Merchant Marine v. Virginia Coaling Corp.*, 1929 A.M.C. 192 (E.D. N.Y. 1929).

It is clear to the Court that Plaintiff cannot place itself within the literal wording of § 730's tolling provision. The recovered items were within the Western District of Texas since at least August 5, 1969, and of course at all times were subject to the jurisdiction of some federal court. Thus it is clean that there was an opportunity to "arrest" the salved goods within two years after the rendition of any salvage services. That a suit might not have been maintainable during that period because of a sovereign immunity defense on the part of the other claimant does not mean that the goods could not have been arrested, just as the presence of an affirmative defense does not affect the validity of process in an ordinary

civil suit. Similarly, even assuming that the pendency of the two prior federal suits might in some manner have tolled limitations, it is clear that for a total of some 42 months since the cessation of salvage operations and prior to the filing of this suit, there was no suit pending with regard to these matters. Moreover, the Brownsville suit, the only one filed within the two year limit, was filed in a court lacking jurisdiction. Consequently, the only way Plaintiff could hope to avoid limitations is simply to argue the limitations started running only after the State gave its consent to suit. Even then, Plaintiff did not actually seek the State's consent until many years after the end of salvage operations.

While Plaintiff's arguments might have considerable merit if an equitable theory of laches were being applied, this Court does not feel that it is in a position to ignore the literal wording of a Congressional statute. 46 U.S.C. § 730 states that the limitations period begins to run "from the date when such assistance or salvage was rendered" and contains its own tolling provisions which, as noted, is inapplicable to Plaintiff.

Commencement of the limitation period on the date when assistance or salvage services were rendered contrasts significantly with the frequent commencement of limitations periods on the date when the "cause of action accrued." Indeed most, if not all, of the cases cited by Plaintiff for the proposition that limitations does not begin to run in favor of the sovereign until the sovereign consents to suit involve limitation statute using the "accrual" language. *See, e.q., United States v. Fuston,* 143 F.2d 16 (10th Cir. 1944); *Walker v. State,* 103 S.W.2d 404 (Tex. Civ. App.—Waco 1937, no writ). The Supreme Court has noted the importance of such a difference in wording of the limitations statute in another context:

> "[I]f Congress had intended that the cause of action of the shipper to recover damages for unreasonable charges should accrue when the shipment was received, or when it was delivered by the carrier, we cannot doubt that a simple and obvious form for expressing that intention would have been used, instead of the expression 'from the time the cause of action accrues.'" *Louisville Cement Co. v. Interstate Commerce Comm'n*, 246 U.S. 638, 644 (1918).

The Court feels that in 46 U.S.C. § 730 Congress did adopt a "simple and obvious form of expression" to indicate its itention that the period of limitations should begin to run from the date of rendition of services, and not from the date a suit might first be legally instituted. The language of Congress is specific and controlling; it is not for this Court to ignore it.

Having decided that Plaintiff's action is barred by limitations, the Court need not discuss the question of "marine peril."

It is accordingly

ORDERED that the State's motion to dismiss be GRANTED, and that this suit be DISMISSED for failure to state a claim upon which relief can be granted.

Entered this 14th day of November, 1977, at Austin, Texas.

/s/ Jack Roberts

JACK ROBERTS
UNITED STATES
DISTRICT JUDGE

APPENDIX H

Memorandum Opinion and Order
of the United States District Court
for the Western District of Texas

Rendered August 13, 1976

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.

No. A-76-CA-99

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Platoro Limited, Inc.	*	
	*	
V.	*	Civil Action No.
	*	A-76-CA-99
The Unidentified Remains	*	
of a Vessel	*	

MEMORANDUM OPINION AND ORDER

Came this day for consideration by the Court the above styled cause. The Court, having considered the pleadings, motions and briefs in support of the motions, is of the opinion that the State of Texas's unopposed Motion to Dismiss ought to be granted.

This is a suit under the federal admiralty and maritime laws in which Plaintiff seeks to recover, as salvor, for the salvaging of items which were lost when a Spanish galleon sank near Padre Island in the 1550's. Under the common law, adopted by Texas and the United States, abandoned "wrecks of the sea," including both vessels and cargo, belong, on recovery, to the sovereign, unless claimed by the owner within a year and a day. *Platoro Limited, Inc. v. Unidentified Remains of a Vessel*, 371 F.Supp. 356, 360 (S.D.Tex. 1973), *rev'd on other grounds*, 508 F.2d 1113 (5th Cir. 1975); 63 A.L.R.2d, p. 1376, §5. Since the salvaged items in the instant case were not claimed by the owner within a year and a day of the wreck, title devolved on the sovereign, and thus, under the common law, the State of Texas now has title to all the recovered items. Because title to the recovered items is in the State of Texas, the effect of the Eleventh Amendment on the power of the Court to hear this suit must be considered. The Eleventh Amendment applies to admiralty suits, just as it does to suits in law

and equity. *In Re New York*, 265 U.S. 490 (1920), *Intracoastal Transportation Inc. v. Decatur County, Georgia*, 482 F.2d 361 (5th Cir. 1973). Those suits involved in personam actions against the state in admiralty suits, but since the state is here the owner of the res which is the subject matter of this in rem action, the State of Texas is just as surely the real party in interest in this suit as if it were an in personam action against the State of Texas. Thus, since the State of Texas is the real defendant at interest in this suit, and since the state has not given its consent to be sued, this action cannot be maintained in federal court because the federal courts have not power, under the Eleventh Amendment, to hear it. *Edelman v. Jordan*, 415 U.S. 651 (1974). Thus, this suit must be dismissed for want of jurisdiction. This disposition makes it unnecessary to rule on the state's motion to dismiss for failure to state a claim under the admiralty laws and because the statute of limitations had run. Likewise, it is not necessary to rule on the join motion for intervention by Jefferson T. Burke and Billy Russell Algoe, Accordingly, it is

ORDERED, ADJUDGED and DECREED that the State of Texas's motion to Dismiss this cause of action should be, and hereby is, GRANTED.

Entered this 13th day of August, 1976, at Austin, Texas

/s/ Jack Roberts

JACK ROBERTS
UNITED STATES
DISTRICT JUDGE

APPENDIX I

Opinion of the United States Court of Appeals for the Fifth Circuit

Rendered February 27, 1975

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.

No. 74-1540

508 F.2d 1113

PLATORO LIMITED, INC.
Plaintiff-Appellee-Cross-Appellant,
v.

The UNIDENTIFIED REMAINS OF A VESSEL, her cargo, etc.,*Defendants,*

State of Texas, *Movant-Appellant-Cross Appellee,*

Jefferson T. Burke and Billy Russell Algoe,
Intervenors-Appellees.

No. 74-1540

United States Court of Appeals,
Fifth Circuit
Feb. 27, 1975.

Appeals from the United States District Court for the Southern District of Texas.

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge:

In 1555 several Spanish vessels sank off the coast of Padre Island, Texas, in the Gulf of Mexico during a huricane. The wreckage remained there practically undisturbed until September 9, 1967.[1] On that date Platoro Limited, Inc., an Indiana corporation, began operations

1. The artifacts came to rest on the clay bottom of the Gulf of Mexico, thirty to forty feet underwater. Eventually they were covered by four to ten feet of sand. Under these conditions, the items were effectively impervious to weather conditions above the surface of the sea, and the sand prevented deterioration underwater. The items remained in this state of equilibrium until 1967 when Platoro commenced recovery operations.

to recover the remains of the vessels. Platoro successfully located some artifacts, and, as the items were recovered, it shipped them to Gary, Indiana. Recovery operations took place from September until December 13, 1967, when the 28th Judicial District Court for the State of Texas issued a temporary restraining order prohibiting Platoro from conducting further salvage operations. The State of Texas had instituted the state court suit under former §§ 147a & 147b of the Texas Penal Code.[2]

Shortly after the state court suit was filed, Jerry Sadler, then the Texas Land commissioner, opened negotiations with Platoro regarding the recovered items. After considerable negotiation, Platoro and Sadler agreed to a contract dividing the articles already recovered, and arranging for continued exploration of the Padre Island area. An officer of Platoro signed the contract, but no representative of the State of Texas ever did. Pursuant to the negotiations, Platoro returned the recovered items to Austin, Texas, where they were held by the General Land Office. In September 1969, the state judicial district court ordered the items transferred to the Texas Archaeological Research Library, also located in Austin.

On August 6, 1969 Platoro filed an *in rem* suit in the federal district court for the Southern District of Texas. Platoro's complaint sought a declaration that title to the recovered items was vested in Platoro, or alternatively a salvage award for the recovery operations. The State of Texas appeared in the district court, filing a plea of immunity from suit and requesting dismissal for lack of jurisdiction. The district court refused to dismiss the suit, and enjoined the state district court from

2. Tex.Laws 1931, 42d Leg., 1st C.S., ch. 32 at 71; Tex.Laws 1939, 46th Leg. at 60.

disposing of the *res*. After a hearing, the court ruled that Platoro was entitled to a salvage award for its actions in recovering the items. In its memorandum and order of December 26, 1973, the district court held that (1) the district court had *in rem* jurisdiction and subject matter jurisdiction over Platoro's claim; (2) that Texas had title to the artifacts; (3) and Platoro should receive a salvage award of $131,248.00. The State of Texas appeals the district court's judgment on several grounds: (1) lack of *in rem* jurisdiction; (2) lack of subject matter jurisdiction since (a) Texas did not waive sovereign immunity, and (b) no maritime peril existed; and (3) improper computation of the salvage award. We reverse on the *in rem* jurisdiction point, and therefore find in unnecessary to consider the other claims.[3]

To establish *in rem* jurisdiction in admiralty the res must be present in the district when the suit is filed or during the pendency of the action. Rule C(2), Supplemental Rules for Certain Admiralty and Maritime Claims provides: "In actions in rem the complaint ... shall describe with reasonable particularity the property that is the subject of the action and state that it is

3. The parties did not extensively brief or argue the sovereign immunity question. We feel compelled to point out, however, that this proceeding raises serious Eleventh Amendment questions. That Amendment provides: "The Judcial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S.Const. Amend. XI. Through the language of the Amendment is narrow, the Supreme Court has construed the provision broadly. *See* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1959); Hans v. Louisiana, 134 U.S. 1, 10 s.Ct. 504, 33 L.Ed. 842 (1890). Thus there are Eleventh Amendment considerations in an admiralty suit as well as a "suit in law or equity." In re New York, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921); Intracoastal Transp., Inc. v. Decatur Cty., Georgia, 482 f.2d 361 (5th Cir. 1973). *See also* Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

within the district or will be during the pendency of the action." Rule E(3)(a) of the Supplemental Rules states: "Process in rem and of maritime attachment and garnishment shall be served only within the district." The fact that the artifacts originally lay within the Southern District does not establish *in rem* jurisdiction. *See* American Bank of Wage Claims v. Registry of District Court, 431 F.2d 1215 (9th Cir. 1970). Platoro itself removed the artifacts from the Southern District of Texas long before filing the suit there, and, when the monition issued the artifacts were in the Western District of Texas.

In its jurisdictional ruling, the district court acknowledged that the artifacts were not within the Southern District. It felt, however, that this case fell within exception to the general rule that removal of the res destroys a court's jurisdictional base. Where the res is accidentally, fraudulently, or improperly removed from the district, the court's *in rem* jurisdiction is not destroyed. The Rio Grande, 90 U.S. (23 Wall.) 458, 23 L.Ed. 158 (1874); American Bank of Wage Claims v. Registry of District Court, *supra;* Martin v. The Bud, 172 F.2d 295 (9th cir. 1949). The exception cannot apply, however, where the district court did originally establish its *in rem* jurisdiction. Furthermore, Platoro was the party who removed the artifacts from the Southern District. The fraud, if any, occurred in effecting removal of the artifacts from Gary, Indiana to Austin, Texas.

The district court relied on an alternative theory to establish its jurisdiction. In December 1967, the State of Texas sued Platoro in state court to enjoin the recovery operations. The court below reasoned that the state district court's assumption of jurisdiction over Texas and Platoro, gave the federal court the requisite jurisdictional base. We cannot divine the basis for the district court's assertion of jurisdiction is unclear, but it does not appear that the state court had *in rem* jurisdiction of

the artifacts that are the subject of this suit. When Texas filed its state court action, Platoro had already removed those items to Gary, Indiana. Further, the state voluntarily dismissed the sate court suit before the federal suit went to trial. The district judge below specifically found that the dismissal was in good faith, and not an attempt to destroy the federal court's jurisdiction. Thus the basis for the district court's novel *custodia legis* theory was removed by the trial date.

The res in question was not actually or constructively present in the Southern District of Texas when Platoro filed suit. The service of process by publication did not operate to establish *in rem* jurisdiction since Platoro had previously removed the artifacts. Therefore we reverse and remand this cause to the district court with directions to dismiss for lack of jurisdiction.

APPENDIX J

Opinion of United States District Court
for the Southern District of Texas

Rendered December 26, 1973

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.

Civ. A. No. 69-B-86

371 F. Supp. 356

PLATORO LIMITED, INC., an Indiana corporation, as Salvor,

V.

The UNIDENTIFIED REMAINS OF A VESSEL, her cargo, apparel, tackle and furniture, in a cause of salvage, Civil and Maritime.

Civ. A. No. 69-B-86.
United States District Court,
S.D. Texas,
Brownsville Division.
Dec. 26, 1973.

GARZA, District Judge.

Platoro Limited, Inc., an Indiana corporation, brought this suit in a cause of salvage, civil and maritime, against the unidentified remains of a vessel, her cargo, apparel, tackle and furniture on August 6, 1969. The plaintiff-salvors had located the remains of Spanish vessels, which sank during a hurricane in the year 1554, off the shores of historic Padre Island, located in the Gulf of Mexico. The recovery of the artifacts made the subjects of this lawsuit were recovered by the plaintiff in September, October, November and December of 1967, until restrained on December 13, 1967, by a temporary restraining order out of the 28th Judicial District Court of Kennedy County, Texas. Because of the pendency of the state suit, notice was given to the State of Texas, although the plaintiffs in this case proceeded in their salvage claim by the issuance of monition.

The State of Texas appeared and filed its plea of immunity from suit and asked that the same be dismissed for want of jurisdiction. After holding a hearing on January 17, 1970, this Court issued a Memorandum dated the 12th of June, 1970, 371 F.Supp. 351, in which

it held that this, in truth and in fact, was a true salvage claim, retained jurisdiction, and left the question of a salvage award for a later hearing. This Court's Memorandum of June 12, 1970, is hereby adopted by reference and must be read in connection with this Memorandum to fully understand what this Court is holding, and any findings of facts or conclusions of law reached in said Memorandum of June 12, 1970, are hereby adopted by reference.

At the time of its Memorandum and Order of June 12, 1970, this Court certified its interlocutory decree, under 28 U.S.C. § 1292(b), allowing the State of Texas to seek an immediate appeal of the Order, but the Honorable Circuit Court of Appeals for the Fifth Circuit, on August 11, 1970, denied the interlocutory appeal on the order of Judges Ainsworth, Bell and Godbold. In the meantime and subsequent to the denial of the interlocutory appeal, two intervenors sought leave of the Court to intervene. They were Jefferson T. Burke and Billy Russell Algoe. They were also making salvage claims on the items recovered from the sunken Spanish galleon.

The Court was interested in finding out what the value of the artifacts salvaged was, so as to be in a position to make the salvage award. A haphazard attempt was made to comply with the Court's wishes to get experts to put a value on the artifacts that were recovered, but it was not until a hearing held in this Court on November 1, 1973, that the Court was able to get sufficient evidence into the record of the value of the goods salvaged.

There is not question that the artifacts recovered are of great historical value, but unfortunately we cannot put a dollar sign on an historic work and we are relagated to the recognized rule of commercial or market value.

The State of Texas is still stressing and urging vehemently its position that this Court is without jurisdiction in this matter. They say that the *res* made the subject of this salvage claim was not physically within the boundaries of the jurisdiction of this Court at the time the salvage claim was filed; that the artifacts were in Austin, Texas, which is in the Western District of Texas, and outside the jurisdiction of this Court. They also urge that this Court has never arrested the *res* and has no control over it. They say that this Court's possession of the *res* is contructive, at best, and constructive possession is not enough to confer jurisdiction on this Court. They cite to this Court the case of The Zev, 63 U.S.App.D.C. 146, 70 F.2d 750 (1934), in which an *in rem* action was dismissed for lack of jurisdiction. This Court does not disagree with that case, but the facts in this case are distinguishable from the case of *The Zev*. There is not question that the salvage operations made the basis of this lawsuit took place with the jurisdiction of this Court. The artifacts recovered were entered through Customs within this District, and then removed to Indiana, by the salvors who were of the mistaken belief that they were sole owners under some theory of "finders'keepers".

When the state suit above referred to was filed and the plaintiffs enjoined from further salvage operations, the then Land Commissioner of Texas Jerry Sadler, began extensive negotiations with the plaintiffs herein with regard to a division of the salvaged items and the future exploration of the sunken vessesl, which resulted in a contract being drawn dividing the salvaged articles then existing on a fifty-fifty basis. This contract was signed by the plaintiff, but apparently never executed by the Commissioner. Acting on the assumption that they had a contract, the salvors in this case returned most of the artifacts to the Land Commissioner's office in Austin, and those that were not returned at that time were returned latter under orders of the State District

Court in the suit above referred to. Once the artifacts found by the salvors were in the custody of the Land Commissioner, he disowned the contract that he had been discussing with the plaintiffs, and stated the he had only done what he had done to get the artifacts back to the State of Texas. I find that if the *res* in this case is in the Western District of Texas, it is there by the fraud committed by the then Land Commissioner of Texas, or under the orders of a State Judge, and it cannot be urged by the State now that the jurisdiction lies in the Western District of Texas because of the fraudulent actions of its then Land Commissioner.

At the time the suit was filed in the State Court of Kennedy County, the State Judge, on his own motion, had taken *custodia legis* of the *res* in this lawsuit and at first ordered the *res* held in the Land Commissioner's office and latter transferred it by order to the Texas Archeological Research Laboratory in Austin, Texas, for restoration and to be fully and completely studied, described, photographed and analyzed, with a view to a full preservation of all the data that could be accumulated about it. When the State Court, which is within the jurisdiction of this Court, took *custodia legis* of the *res* made the subject of this suit, it recognized that the plaintiffs here had voluntarily returned some of their articles to Austin, but required all articles to be returned. The State Court appointed an Inventory Committee and it was this Inventory Committee that brought the final artifacts to Texas.

This Court is aware of the ancient and important rule that where the property is in the actual possession of one Court of competent jurisdiction, such possession cannot be disturbed by any other Court, and if the Stae Court has first acquired custody, the Federal Court must decline jurisdiction. 1 Barron and Holtzoff, (Wright Ed.), Section 46.1, p.245. However this rule does not apply when the subject matter of a suit involv-

ing the *res* is not subject to concurrent jurisdiction. The 28th Judicial district Court of Kennedy County, a Court within the jurisdiction of this Court, had *custodia legis* of the *res,* but as this Court maintained in its Memorandum of June 12, 1970, this Court, and this Court only, had jurisdiction to determine the salvage lien claimed by plaintiffs, something that the State Court could not do.

The Court did not disturb the *custodia legis* or possession of the State Court, but in aid of this Court's jurisdiction enjoined the State Court from disposing of the *res* until further orders of this Court. An old Supreme Court case of ancient vintage, but still being cited with approval, Moran v. Sturges (1894), 154 U.S. 256, pp. 283-285, 14 S.Ct. 1019, 38 L.Ed. 981, is ample authority for this Court to have ignored the ancient rule above referred to.

No warrant of arrest out of this Court was necessary, for such warrant of arrest would have precipitated the collision between two Courts that the ancient rule above referred to and cited in Wright's Edition of Barron and Holtzoff was aimed to avoid. A Court that had *custodia legis* was enjoined by this Court from disposing of the *res* made the subject of this lawsuit until further orders of this Court, and the *res* was in this Court just as if the United States Marshall had gone to arrest the property, for the *res* was in this Court from that point forward for the purpose of enforcing a maritime lien.

At the hearing on November 1, 1973, it was made known to the Court that the state suit in the 28th Judicial District Court of Kennedy County had been dismissed the day before by the State, with the costs charged against the State. This Court inquired of the First Assistant Attorney General of Texas if this action had been taken to defeat the jurisdiction of this Court, for if it had, this Court would have been forced to take

further action on its injunction, but the Honorable State Assistant Attorney General assured the Court that the dismissal of the state suit was not for that purpose.

There is no question that this Court, as a United States District Court, has jurisdiction over a salvage maritime lien, and that only a Federal Court such as ours has that jurisdiction. The points raised by the State have to do more with which Federal Court should have taken cognizance of this action. The salvage operation took place and the *res* was first salvaged in this District. Since the artifacts found were of foreign vintage, the salvors entered them through Customs at Brownsville, Texas, in this District. As explained above, the *res* was transferred by the salvors to Indiana and then returned to Austin, Texas, in the Western District of Texas, in large part by the fraud explained above. This action, therefore, could have been brought in only three Federal District Courts: one in Indiana, the one in the Western District of Texas, and here. Taking the State's argument at face value, the suit could not have been brought in Indiana, because the *res* had left that jurisdiction. If it is in the Western District of Texas by fraud, it should not be brought there. There remains only this District and for the reasons above stated, this Court reiterates its jurisdiction over the subject matter. The salvage lien, if any, arose here in this District, and here it will be enforced.

The Plaintiffs, on the other hand, are re-urging to the Court their right to outright title to the *res* on some theory of "finders-keepers", claiming that this was abandoned property and have cited to the Court Schley v. Couch, 155 Tex. 195, 284 S.W.2d 333 (1955). They claim that the State of Texas does not have any right to claim this property as owner, as the owner was the government of Spain, and they have not appeared pursuant to the monition issued out of this Court. Short work can be made of this claim of the plaintiffs, for if

they are not claiming a salvage or maritime lien, but instead are claiming outright ownership under the law of "finders-keepers", they have no business in this Court sitting as a Court in admiralty, but could have pursued their claims in the State suit file in Kennedy County. The plaintiffs are attempting to bring this suit on the basis of diversity and amount. It should be further noted that if this was simply a title suit to the salvaged items, concurrent jurisdiction would then exist between the State Court of Kennedy County and this Court, and since the State Court had taken custody of the salvaged items, this Court would have had to decline jurisdiction because of the rule above referred to. But this Court has already held that this is a true salvage claim by its Memorandum of June 12, 1970, and it will proceed on that basis.

Under the better view and what this Court believes to be the common law adopted by Texas and the United States, abandoned "wrecks of the sea", including both vessels and cargo, belong, on recovery, to the sovereign, unless claimed by the owner within a year and a day. 63 A.L.R.2d, p. 1376, § 5. This Court has no evidence of who owned the galleon that sank in 1554. It was neither owned by the government of Spain or some private Spanish owner, but regardless, ownership reverted to the crown of Spain within one year and one day, and thence to Texas through the seccession of governments. The fact that Texas had no statute such as Florida in the case of State by Ervin v. Massachusetts Co., 95 So.2d 902, 63 A.L.R.2d 1360, cert. den'd, 355 U.S. 881, 78 S.Ct. 147, 2 L.Ed.2d 112, makes no difference. The State of Texas had a perfect right to come into this Court and claim as owner the *res* involved in this lawsuit, for more than a year and a day had passed since the finding of the *res* when the lawsuit was filed. The claim of the plaintiffs that they should be granted outright title to all of the *res* involved here is denied.

At the hearing on November 1, 1973, the Court heard evidence as to the value of the goods salvaged by Plaintiffs. Testifying on the question of value was Mr. Mendel Peterson, who from 1948 until his retirement in 1973, held several curatorial and administrative positions with the Smithsonian Institute. His offered qualifications as an expert were more than adequate. He, like all others involved in this case, realized that the historic value of the articles recovered was priceless. The State offered the testimony of Miss B. Weingast, an appraiser for Sotheby Parke Bernet, Inc. The witness Peterson put a market value on the artifacts recovered at $294,618.00, and Miss Weingast a value of $98,000.00. After hearing both parties testify in person, noting their qualifications, their background and their knowledge of the subject matter, this Court believes that the appraisal of Mendel Peterson is more believable, and finds the market value of the salvaged items to be as he testified. His appraisal surely seems the more authoritative of the two, and more in line with a generally held view that these priceless finds by the salvors were worth millions of dollars. The Plaintiffs in this case are claiming that they spent a total of $139,301.80, in their salvage costs. The State of Texas, on the other hand, is claiming that they spent some $200,000.00 in restoring the items to their present state and value. What the slavors have spent is something to be considered in arriving at their salvage lien, and it will be so considered. What the State claims in restoration costs is something else. The testimony of Mendel Peterson was to the effect that the most valuable items in the find needed no restoration, or very little if any, and that appraised items consisting of gold, silver, brass and bronze were not enhanced in value by the restoration, and this amounted to $241,082.00 of the total market value, There is no testimony before this Court that the State of Texas appropriated any special funds for the restoration claimed, but it was done by employees of the State under the regularly budgeted line item funds.

While there is evidence that a building was constructed to take care of the restoration, this building will still remain to the State, and can be used for years to come in its arheological studies.

The witness Peterson gave extensive testimony regarding the effect of restoration on market value. On many items, as noted above, restoration did nothing to increase their value. Some of the items needed extensive restoration. From his testimony, we can find that items which he testified were worth $53,536.00 and which required extensive restoration, were worth only forty (40%) per cent of the $53,536.00, at the water's edge. Taking his testimony, we can safely say that restoration by the State amounted to an increase in value of items salvaged of $32,122.00.

The State's contention that the cost of restoration and so forth and the value placed on it by its appraiser would make the *res* have no market value is totally without merit.

The market value of the salvaged items being $294,000.00, minus a reasonable restoration cost expanded by the State of $32,122.00, is the true market value of the salvaged items when brought up by the salvors.

The remaining question is how much should this Court award to the salvors.

While the State of Texas and many others knew of the existence of the sunken Spanish galleons off the Texas coast, it took the Plaintiffs here to bring up the items recovered. The galleon was at a place where the public could enter. Texas had no statute as it does now protecting them. This Court from the very beginning has thought that the parties in this case, the State of Texas through its then Land Commissioner and the

plaintiffs themselves have always thought, that a fifty-fifty division was the correct measure of the salvage claim. Where the parties at interest have so agreed among themselves, this Court sees no reason why it should interfere, if the negotiations carried on amounted in the eyes of this Court, to a pre-determined contract of salvage, and therefore, this Court finds that the plaintiff-salvors are entitled to one-half of the value of $294,618.00, less one-half of the restoration costs, or a total award of $131,248.00.

The intervenors, Jefferson T. Burke and Billy Russell Algoe, both testified in this cause. They stand in the same shoes as Platoro, and apparently were working with Platoro, and are making claims for monies not yet received from Platoro, the plaintiff is this cause. Intervenor Burke is claiming $17,500.00, and Intervenor Algoe is claiming $6,000.00. From the evidence before me, I find that out of the salvage award of $131,248.00, the Intervenor Burke is entitled to the sum of $8,750.00, and the Intervenor Algoe is entitled to the sum of $3,000.00, for in this Court's view, they were sort of joint venturers with Platoro, and some of the claims made by them were actually in aid of the main salvor, Platoro, and services rendered to it, and not actually expended in the bringing up of the salvaged items, and at least one-half of the claims should have been for services rendered to Platoro and not on behalf of the salvaged items. In this Court's view, many of the items testified to by Burke and Algoe were included in the sum that the main salvor, Platoro, the plaintiff in this case, testified was spent by them in this salvage operation.

The State of Texas and some of those who appeared in this Court as *amicus curiae* in the past have expressed great desire in having the State keep the *res* in its museums. The State of Texas will, therefore, be given a reasonable time in which to pay this salvage award in cash. Failing in this, the salvaged items will be divided

in kind following the value of the salvaged items as found by Mendel Peterson. If the parties cannot agree on the division, this Court will retain jurisdiction to appoint a Master to accomplish the task.

This Memorandum includes the Findings of Fact and Conclusions of Law of this Court, and is a Final Judgment.

The Clerk will send copies of this Memorandum and Order to counsel for the parties.

APPENDIX K

Judgment of the United States Court of Appeals for the Fifth Circuit

Rendered January 20, 1983
Issued as Mandate February 28, 1983

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.

No. 81-1257

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 81-1257

D.C. Docket No. A-77-CA-112

PLATORO LIMITED, INC.

Plaintiff-Appellee,

JEFFERSON T. BURKE
AND BILLY RUSSELL ALGOE,

Intervenors-Appellees,

versus

THE UNIDENTIFIED REMAINS OF A
VESSEL, HER CARGO, APPAREL, TACKLE
AND FURNITURE, IN A CAUSE
OF SALVAGE, CIVIL AND MARITIME,

Defendant,

STATE OF TEXAS,

Claimant-Appellant.

Appeals from the United States District Court for the Western District of Texas

Before BROWN, WISDOM and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard in the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judment of the said District Court in this cause be, and the same is

hereby, affirmed in part; vacated in part; and that this cause be, and the same is hereby remanded to the said District Court with instructions.

IT IS FURTHER ORDERED that each party shall bear its own costs on appeal in this Court.

January 20, 1983

ISSUE AS MANDATE: FEB. 28, 1983

APPENDIX L

Order on Petition for Rehearing of the United States Court of Appeals for the Fifth Circuit

Rendered February 17, 1983

Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.

No. 81-1257

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 81-1257

PLATORO LIMITED, INC.,

Plaintiff-Appellee,

JEFFERSON T. BURKE and
BILLY RUSSELL ALGOE,

Intervenors-Appellees,

versus

THE UNIDENTIFIED REMAINS OF A VESSEL, HER CARGO, APPAREL, TACKLE AND FURNITURE, IN A CAUSE OF SALVAGE, CIVIL AND MARITIME

Defendant,

STATE OF TEXAS,

Claimant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(February 17, 1983)

Before BROWN, WISDOM and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Carolyn Denise Randall

United States Circuit Judge

CLERK'S NOTE:

SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MADATE

APPENDIX M

Temporary Restraining Order and Order Appointing Temporary Receiver of Specific Assets, entered by the 28th Judicial District Court, Kenedy County, Texas

Entered December 13, 1967

State of Texas v. Platoro Limited, Inc.

No. 81

No. 81-1257

THE STATE OF TEXAS	§	IN THE DISTRICT
	§	COURT
VS.	§	OF KENEDY COUNTY,
	§	
PLATORO LIMITED, INC., ET AL	§	TEXAS, 28th JUDICIAL DISTRICT

TEMPORARY RESTRAINING ORDER
AND
ORDER APPOINTING TEMPORARY RECEIVER
OF SPECIFIC ASSETS

On this the 13th day of December, 1967, came on to be heard; in the above entitled and numbered cause wherein the State of Texas is Plaintiff; and Platoro Limited, Incorporated, and Indiana corporation; Quest Geo-Marine Research, a California nonprofit corporation; Paul Znika, Clyde Means, Max Znika, Joe Ensick, Steve Gursak, John Selterich, Kurt Purvis, Fritz Carr, Richard Pasqual and Billy Kenon, Jr., are Defendants; the application of the State of Texas, represented herein by the Attorney General, for a temporary restraining order and a temporary receiver of specific assets, and it appearing to the court that the above entitled cause is an action by the State of Texas through its Attorney General, under the authority and directive of the Constitution and laws of this State, and the court having considered Plaintiff's verified petition, is of the opinion and so finds that the law and facts are what the Plaintiff has alleged in its petition and that there exists a present and urgent necessity for the immediate entry of an order, without notice, appointing and directing a temporary receiver, in this instance, being Clark Slater, to take possession of and to preserve and protect all personal property of any character and kind belonging to Platoro Limited, Inc, and Quest Geo-Marine Research, found within the State

of Texas, specifically including any and all artifacts and things of value taken by any of the above named Defendants, or by anyone else, from the site of a sunken ship on public lands of the State of Texas, and found within the possession or control of any of the said Defendants, and to preserve and protect the same, pending hearing on Plaintiff's Original Petition; and,

Further, that the said above named Defendants, and each of them, should be restrained and enjoined as hereinafter specifically provided; and in support thereof the court finds that unless temporarily restrained, such Defendants will continue to conduct such activities, and transact such business contrary to the laws of the State of Texas and too the public in general before notice can be served and a hearing had hereon unless said Defendants be restrained pending hearing; and that the interest of the State seem to require that such temporary receiver be appointed.

It is, therefore, ORDERED, ADJUDGED and DECREED by this court that Clark Slater, of Kenedy County, Texas, be, and he is hereby, directed as temporary receiver to take possession of, and to preserve and protect, all personal property of any character and kind belonging to Platoro Limited, Inc. and Quest Geo-Marine Research, found within the State of Texas, specifically including any and all artifacts and things of value taken by any of the above named Defendants, or by anyone else, from the site of a sunken ship on public lands of the State of Texas, and found within the possession or control of any of said Defendants, pending final hearing hereof; and,

Said Clark Slater, as such temporary receiver, is hereby granted and given all equitable powers and authority under any and all applicable statutes and under the common law of this State authorizing the appointment of a receiver.

Such appointment to become effective upon his taking and filing the oath as required by law, and making the bond required by law in the sum of $500.00, to be approved by the court.

Said receiver shall make and file with this court an inventory of the property which comes into his hands as such receiver, and shall do and perform such other things in connection with such receivership as the court may, from time to time, order and direct.

It is further, ORDERED, ADJUDGED and DECREED that said Defendants, and each of them, are restrained and enjoined as follows:

(1) From committing waste on public lands of the State of Texas;

(2) From appropriating or taking any property of value from the public lands of the State of Texas; and

(3) From engaging in the act or business of diving for, excavating, mining, destroying or removing any artifacts or things of value from any historic ruin or archeological site located on public lands of the State of Texas and in particular the site of a sunken ship lying approximately 2.8 miles north of the Port Mansfield cut, and ½ mile east of the seaward shore of Padre Island, at a depth of approximately 30 feet of water; and

It is further ORDERED, ADJUDGED and DECREED that said corporate Defendants, Platoro Limited, Inc. and Quest Geo-Marine Research, and each of their officers, directors and employees, be and the same are hereby restrained and enjoined from transacting business in either of such corporations in this State without first obtaining a charter or certificate of authority to do so; and,

Further, that each and every named Defendant is hereby restrained and enjoined from removing any artifact or thing of value heretofore excavated by them from the public lands of the State of Texas;

It is further Ordered that the Clerk of this court shall issue a temporary restraining oreder in accordance herewith.

It is further Ordered by this court that this temporary restraining order here and now granted shall continue in effect for a period of not more that ten (10) days, and unless otherwise continued in effect by order of this court, shall expire at 10 o'clock a.m. on the 20th day of December, 1967.

Hearing on Plaintiff's application for a temporary injunction is set for the 20th day of December, 1967, at 10 o'clock a.m. at the courtroom of the 28th Judicial District Court, at the Courthouse in the city of Sarita, in Kenedy County, Texas, at which time the court shall consider whether the appointment of such temporary receiver shall be continued.

All of the foregoing is subject to further orders of the court.

Done at Corpus Christi, in Nueces County, Texas, this the 13th day of December, 1967, at 10 o'clock a.m.

/s/ Paul A. Martineau

Judge, 28th Judicial District
Court of Kenedy County, Texas.

M-5

E-517 Certificate of True Copy of Papers on File-Class 1
(Arts. 6600-6625) Texas Standard Form

THE STATE OF TEXAS

County of KENEDY

I, FAYE CHANDLER, *clerk of the* 28th DISTRICT *Court of* Kenedy *County, Texas, do hereby certify that the foregoing is a true and correct copy of the original* TEMPORARY RESTRAINING ORDER AND ORDER APPOINTING TEMPORARY RECEIVER OF SPECIFIC ASSETS Styled: THE STATE OF TEXAS VS. PLATORO LIMITED, INC., ET AL. #81 *now on file in said Court.*

Given under my hand and seal of said Court, at office in Sarita *this* 24th *day of* March *19*81

FAYE CHANDLER *Clerk*

by /s/ *Deputy*

FILED

at 1:30 0'clock p..m.
December 13, 1967
Faye Chandler
Clerk, Dist Court, Kenedy
Co., Tex.

by_____Deputy

Office Supreme Court, U.S.
FILED
JUN 16 1983
CLERK, SUPREME COURT

No. 82-1871

In The

Supreme Court of the United States

October Term 1982

THE STATE OF TEXAS,

Petitioner,

vs.

PLATORO LIMITED, INC.,

Respondent.

IN RE THE UNIDENTIFIED REMAINS OF A VESSEL, HER CARGO, APPAREL, TACKLE AND FURNITURE

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

This case arises from the salvage activities conducted by Platoro, Ltd., Inc., in 1967, on the *Espiritu Santo,* a Spanish ship which sank approximately one-half mile off Padre Island, Texas, in 1554. From 1554 until 1967, when the shipwreck and its artifacts were salvaged by Platoro, Ltd., Inc., the shipwreck and artifacts were absolutely lost to mankind and were in constant danger of being destroyed by the activities of man, the ravages of nature, or both.

The issues presented for review by this court are:

1. Whether the salvage of the *Espiritu Santo* is a "traditional maritime activity," making such salvage activities subject to the admiralty jurisdiction of the federal court.

2. Whether the shipwreck and artifacts salvaged were in a "marine peril," both as a matter of fact and as a matter of law, as a result of having been lost to mankind for over four hundred years and being continuously subjected to the ravages of nature and the actions of mankind engaged in commercial maritime and oil exploration activities.

3. Whether the State of Texas had any legislative or judicial mandate which would have constituted "constructive rejection" of Platoro's salvage services and whether such "constructive rejection" must have been reasonably understood by the salvor.

4. Whether the legislative consent to sue resolution secured by Platoro, Ltd., Inc., constituted a waiver of the State's Eleventh Amendment immunity.

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No. 82-1871

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THE STATE OF TEXAS,

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vs.

PLATORO LIMITED, INC.,

Respondent.

IN RE THE UNIDENTIFIED REMAINS OF A VESSEL, HER CARGO, APPAREL, TACKLE AND FURNITURE

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Platoro, Ltd., Inc., Respondent herein, prays this Honorable Court to deny the petition for writ of certiorari heretofore filed by the State of Texas for several reasons. First, the State of Texas, dissatisfied with an adverse ruling of the courts below, is seeking to have this court upset the well-settled federal maritime law governing salvage activities when the state of salvage law has already been modified to adapt to salvage cases dealing with ancient shipwrecks. Second, the Fifth Circuit has not rendered any decision which is in conflict with the decision of any other federal court of appeals on the same matters pre-

sented in this petition. Third, the issues raised by the State of Texas are concerned with adverse factual findings by the district court and appellate court, rather than legal issues.

REASONS FOR DENYING THE PETITION

A. The Law of Salvage Has Already Been Judicially Modified to Account for Ancient Shipwrecks.

The federal courts have already judicially enacted a doctrine for the protection of archaeologically important wrecks, when said wrecks are being salvaged. The State of Texas has asserted that the state of salvage law as it concerns archaeologically important sites is such that irreparable and immediate damage would occur to such sites unless this court were to adopt the law of sea mining. The State of Texas would further have this court preempt federal salvage law and grant to the State the right to control the salvage of pre-twentieth-century shipwrecks lying within a state's territorial waters.

Platoro would suggest that a grant to the various coastal states of their right to control salvage activities occurring within state territorial waters would prompt greater confusion in what is essentially a harmonious body of salvage law. The State of Texas would have this court believe that the state of salvage law is such that archaeologically important underwater sites are open to unbridled exploration activities conducted by salvors. The State of Texas has failed to realize and appreciate that federal maritime salvage law has, like any other body

of law, changed to keep up with the times and events as they pertain to ancient shipwrecks.

In 1967, the find of the *Espiritu Santo* by Platoro, Ltd., Inc., was the first successful salvage exploration ever conducted along the Texas coast. Subsequent to that date, many numerous other finds and salvage activities were conducted off the coast of Florida, and as a result of the conflicts which arose between the various states and the various salvage parties, the body of salvage law concerning archaeological sites began to take shape. At the outset, the Fifth Circuit, in *Treasure Salvors, Inc. v. Unidentified Wreck & Abandoned Sailing Vessel,* 569 F. 2d 330 (5th Cir. 1978) (*Treasure Salvors I*), adopted the law of finds as one of the primary bases regarding lost ancient ships and artifacts. Actually, the law of finds granted to the finder the title to the artifacts recovered. Such a law implicitly recognized and awarded to the salvors title to the artifacts recovered because the artifacts and shipwrecks had been "lost" to all of mankind. By risking their time, money, and often their lives, the salvors were rewarded with title to the artifacts recovered.

In much of the litigation conducted in the *Platoro* cases, as well as in the *Treasure Salvors* cases, the issue was often raised by the states that the salvors, when salvaging the artifacts, often destroyed historical and archaeological information which was just as important as the artifacts themselves. In essence, this is and was a valid concern on behalf of the states as well as the salvors. However, the federal courts have recently adopted a provision that would require all salvors to conduct salvage activities in such a manner so that the historical and archaeological information, as well as the artifacts them-

selves, can be preserved for the use of mankind. This requirement has been voiced in the various opinions arising from the case of *Cobb Coin Co. v. Unidentified Wreck & Abandoned Sailing Vessel,* 525 F.Supp 186 (S.D.Fla. 1981) and 549 F.Supp. 540 (S.D.Fla. 1982). Therefore, the fears of the State of Texas would be alleviated because henceforth all salvage activities would be conducted under the guidance of and with the cooperation of licensed underwater archaeologists who would ensure that the salvage activities were properly conducted.

> Thus, there can be no suggestion that federal admiralty procedures sanction salvaging methods which fail to safeguard items and the invaluable archaeological information associated with the artifacts salved. Admiralty's policy of weighing the merit of the salvors' service in determining an appropriate award has, since the establishment of the federal court, been "a wholesome doctrine, and it makes it the interest, as well as the duty, of salvors to act with good faith, and never to sleep on their post, or to make a merit of their frauds." *Cobb Coin Co. v. Unidentified Wreck & Abandoned Sailing Vessel,* 525 F.Supp. 186, 208 (S.D.Fla. 1981), 549 F.Supp. 540 (S.D.Fla. 1982).

In the instant case involving Platoro, this Court should not adopt the law of sea mining, but should approve of the holdings in the *Cobb Coin* cases, *supra,* as they would apply prospectively. At the time it conducted its salvage activities, Platoro, Ltd., Inc., endeavored to and did record the provenance data and, in fact, utilized the "state of the art" techniques in restoring the artifacts recovered. The State of Texas, at the time of trial, repeatedly attempted to show that the restoration techniques utilized by Platoro were scientifically unsound. However, the State's own witnesses admitted that but for the Platoro find, the science

and art of restoring underwater artifacts would never have developed. Platoro did use its best efforts in restoring the artifacts based upon the knowledge and the state of the art existent in 1967. At this time, it is unnecessary for this Court to fashion a new body of law. The federal district courts have already begun to fashion and adapt salvage law to deal with the issue of historically and archaeologically important underwater sites. As they presently exist, the new requirements are sound and productive. Obviously, the appellate courts will also impress any further requirements onto this body of salvage law if they deem it necessary. For this Court to deprive the federal courts of their exclusive admiralty jurisdiction and to throw open to the various states and their political legislative bodies the control of maritime and underwater activities conducted within state territorial waters would dismantle the body of uniform federal maritime law that this Court has so often sought to protect.

B. Marine Peril Existed Both as a Matter of Fact and as a Matter of Law.

At the district court level, the judge held that the *Espiritu Santo* "was lost and had been lost for four centuries when it was discovered by Platoro" *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.*, 518 F.Supp. 816 (W.D.Tex. 1981) (Appendix B-7).[1] The recovery of abandoned and derelict property in navigable waters has always been highly favored in maritime law. The subject of salvage received much greater attention in the eighteenth and early nineteenth centuries,

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[1]For purposes of simplification, Platoro Limited, Inc., will refer to the Appendix filed and utilized by the State of Texas in its Petition for a Writ of Certiorari.

and a firm judicial base was established wherein it was held that the recovery of derelict property constituted a meritorious act of salvage. *Fisher v. The Sybil,* F.Cas. 4824 (1816) aff'd., 4 Wheat (17 U.S. 98).

The earlier cases had reasoned that where a salvor had returned lost, abandoned, or derelict property to the rightful owner, if one existed, then such salvor was entitled to a higher award than ordinary salvage cases. *Georgiana,* F.Cas. 5355 (D.Mass. 1866). In more recent cases, the courts have held that persons were entitled to a salvage award for the recovery of "lost" artifacts. *Thompson v. One Anchor and Two Chains,* 221 F. 770 (W.D. Wis. 1915); *Weber Marine, Inc. v. One Large Cast Steel Stockless Anchor and Four Shots of Anchor Chain,* 478 F.Supp. 973 (E.D.La. 1979). The Fifth Circuit, in *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel,* 640 F.2d 560 (5th Cir. 1981) (*Treasure Salvors III*), described the rights of the salvor of lost or abandoned property:

> Although cases involving the principles of the law of finds are few and far between, we think that a basic principle emerges with some clarity from the cases which have considered problems similar to the one presented here. Persons who actually reduce lost or abandoned objects to possession and persons who are actively and ably engaged in efforts to do so are legally protected against interference from others, whereas persons who simply discover or locate such property, but do not undertake to reduce it to possession, are not. This principle reflects a very simple policy—the law acts to afford protection to persons who actually endeavor to return lost or abandoned goods to society as an incentive to undertake such expensive and risky ventures. *Treasure Salvors III, supra,* 572-573.

The Fifth Circuit has held that a "marine peril" is one which need not necessarily be one of imminent and absolute danger. "The property must be in danger, either presently or reasonably to be apprehended." *Fort Myers Shell & Dredging Co. v. Barge NBC 512*, 404 F.2d 137, 139 (5th Cir. 1968). In the instant case, the district court noted that the drilling operations for oil and gas activities were ongoing in the area near the wrecksite, and that the extensive seismic operations being conducted in the activity could easily have disrupted the wrecksite and destroyed or scattered the artifacts even further (Appendix B-9, B-10).

No single event underscores the reality of "marine peril" more than the instance in which the Army Corps of Engineers in constructing the channel for Port Mansfield, Texas, dug right through the remains of the *Santa Maria*, the sister ship of the *Espiritu Santo*, and destroyed many artifacts and ruined many others. Even Curtis Tunnell, the state archaeologist, stated that, "I think that there are, in the past have been, a variety of manmade perils that could threaten those wrecks" (Tr. 717).

The State's argument that Platoro should have made "reasonable inquiry of academically-trained experts" implies that Platoro did not consult experts regarding the salvage and preservation of artifacts. Surely, a former curator and director of underwater exploration for the Smithsonian Institution in Washington, D.C. (Tr. 316) was qualified to give valuable advice and assistance to Platoro, and in fact did. The advice sought from and given by Mendel Peterson to the Platoro group was very helpful in enabling them to preserve the artifacts once they were recovered (Tr. 317-321).

The State of Texas ignores the fact that prior to the Platoro find, no extensive data or process had been developed for the preservation of artifacts (Tr. 245-246). The field of underwater archaeology was in its infancy at the time of the Platoro find, and the "state of the art" as to the preservation techniques was almost nonexistent. With the Platoro find acting as a stimulus, a whole new field of academic and scientific endeavor and study has been created (Tr. 245, 251, 714).

The district court held as a matter of fact that the artifacts were in a marine peril. The Fifth Circuit reaffirmed the factual finding that a marine peril existed (Appendix A-11, n. 9). The Fifth Circuit also held that as a matter of law a marine peril existed, and sub silentio reaffirmed the factual finding of the district court that the artifacts had been "lost" and subject to manmade and natural perils.

C. Platoro's Salvage Services Were Not Constructively Rejected by the State.

The Fifth Circuit, in rendering its opinion, held that they could "find no case where a salvage award was denied because of a constructive rejection of salvage services." 695 F.2d at 902. The court further noted the following:

> Platoro had no reason to understand that its services had been rejected. In the first place, it was far from clear in 1967 that Texas owned the vessel; that was not established until Platoro failed to appeal the 1976 district court decision awarding the *res* to Texas. Further, even if Platoro should have known that Texas was the owner, which we do not believe it should have, the statutes were not calculated to put Platoro on notice that its services had been rejected. There was nothing in the penal statute to indicate to Platoro that a sunken Spanish galleon was an "archaeological site"

within the meaning of the statute. Texas had apparently made no attempt to designate such sites, or indeed even to define them. *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc.,* 695 F.2d 893, 902 (5th Cir. 1983) (Appendix A-13).

In spite of the foregoing, the State of Texas argues that its legitimate interest in protecting its heritage from unauthorized looting should be protected with "maximum sensitivity." However, the State of Texas in this case is once again attempting to apply its 20/20 hindsight to situations which clearly were not contemplated at the time the salvage services were rendered, either by the State itself or by Platoro.

Prior to the Platoro find, the State of Texas had no specific knowledge of the location of the three Spanish galleons (Tr. 706-709), had never designated any historical underwater sites or archaeological sites (Tr. 701), and had not undertaken any procedures or precautions to exercise control over "underwater archaeological sites" (Tr. 705). Furthermore, in 1967, the General Land Office maintained no list of archaeological sites and had instituted no procedure for identifying, marking or permitting exploration on archaeological sites (Tr. 513). As was noted by the appellate court, the Texas Antiquities Code, Tex.Nat. Res.Code Ann. §§ 191.001-.174 (Vernon 1978 & Supp. 1982) was enacted in 1969 as a direct result of the Platoro find, and it makes extensive and pointed reference to sunken ships. There was no statute enacted in the State of Texas at the time prior to or during the Platoro salvage activities that would have put any reasonable person on notice that the salvage activities were being "rejected" by the State of Texas. Platoro conducted the first successful salvage of a Spanish ship ever conducted in the State of

Texas, and it clearly could never have been intended that such salvage activities were rejected.

The State has suggested that art. 147b of the Texas Penal Code was an effective rejection of Platoro's salvage activities. A reading of art. 147b would lead one to conclude that the statute, in any event, was vague, overbroad, and unconstitutional—therefore, unenforceable. The statute applies only to nonresidents of Texas, and does not apply to Texas residents, and is therefore discriminatory. Surely, if the State were so concerned with protecting "archaeological sites" in 1967, it would have extended the prohibitions of that statute to *all* persons, not simply persons from outside the state. The statute itself does not define "archaeological sites," and certainly does not refer to any underwater sites in its text. The Federal Antiquities Act, 16 U. S. C. A. § 433, was very similar in context and wording to art. 147b. The Federal Antiquities Act likewise was similarly vague and unclear, and for that reason was held unconstitutional in *United States v. Diaz,* 490 F.2d 113 (9th Cir. 1974).

The State has also proffered art. 5421 Tex.Rev.Civ. Stat. as its evidence that the services of Platoro were statutorily rejected. As the Fifth Circuit noted at footnote 10 of its opinion, *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc., supra* (Appendix A-12):

> 10. Texas does not argue that its state court suit under article 5421 to enjoin Platoro's excavation constituted a rejection. Indeed, it could not, since the

> services at issue were rendered before the injunction was issued.

Furthermore, the article in question is contained under the statutory heading "Suits for Minerals and Timber."

One of the points not addressed by the State in considering the "constructive rejection" of Platoro's activities is the fact that even under Texas law, Platoro would be entitled to keep the artifacts which it recovered. Essentially, the Texas Supreme Court has adopted the "finder's-keepers" theory in awarding lost property to the finder. *Schley v. Couch,* 284 S.W.2d 333 (Tex. 1955). The State may seek to distinguish the holding in *Schley* on the basis that it does not deal with either public lands or archaeological relics. Platoro's counsel has been unable to find any Texas cases which would support such a position being adopted by the State. In its opinion, the district court held that the Submerged Lands Act of 1953, 43 U.S.C.A. §§ 1301-1315, did not "purport to erode maritime law which governs any activity relating to navigation or commerce on navigable waters" *Platoro Limited, Inc. v. The Unidentified Remains of a Vessel,* 518 F.Supp. 816 (W.D.Tex. 1981) (Appendix B-4, n. 1). Therefore, the State has no reasonable basis on which to statutorily interfere with the salvage activities which were conducted by Platoro. Only Congress has the power to enact statutes which would perfect, modify, or otherwise affect the maritime substantive law of this country. Even then, Congress can only make such modifications in the

main body of maritime law when such changes are enacted only in furtherance of supplementation of a uniform body of federal maritime law. The constitutional power of Congress to enact such legislation is made possible by the necessary and proper clause. *Butler v. Boston S.S. Co.*, 130 U.S. 527 (1889). Therefore, no state legislation is valid if it contravenes acts of Congress or materially alters judicial or legislative expressions of general maritime law (*Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917)), and only Congress has the power to determine the maritime law that shall prevail throughout this country. *Detroit Trust Co. v. Barlum S.S. Co.*, 293 U.S. 21-42 (1934).

D. The Legislative Consent to Suit Resolution was an Effective Waiver of the State's Eleventh Amendment Immunity.

In holding that the legislative waiver was an effective waiver of the State's eleventh amendment immunity, the Fifth Circuit noted that no Supreme Court case had ever considered a situation which involved an express legislative waiver to bring a particular lawsuit. The cases which have been considered by the Supreme Court were usually waivers contained in statutes of general application which contemplated large numbers of suits being brought pursuant to statutory enactment. The legislative waiver secured by Platoro was a personal bill which authorized Platoro to seek "whatever relief to which it may be entitled." The consent was unique to this specific case and

circumstances surrounding Platoro's claim. Platoro had previously filed two cases in federal court (*Platoro I* and *Platoro II*) alleging precisely the same facts, and requesting the same remedy. Both suits had been filed ***in rem*** in United States District Courts and it was certainly contemplated that the instant suit would also be filed in the same manner.

The Fifth Circuit was eminently correct in holding that, given the judicial history of the *Platoro* cases and the facts surrounding the legislative waiver of sovereign immunity, Platoro was indeed permitted to file suit in federal court and maintain this present action.

CONCLUSION

For the foregoing reasons, Platoro prays that petitioner, State of Texas, be denied a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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